

1972

## Adjustment to Hardship Caused by Imports: The New Decisions of the Tariff Commission and the Need for Legislative Clarification

Carl H. Fulda  
*University of Texas*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [International Trade Law Commons](#)

---

### Recommended Citation

Carl H. Fulda, *Adjustment to Hardship Caused by Imports: The New Decisions of the Tariff Commission and the Need for Legislative Clarification*, 70 MICH. L. REV. 791 (1972).

Available at: <https://repository.law.umich.edu/mlr/vol70/iss5/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# ADJUSTMENT TO HARDSHIP CAUSED BY IMPORTS: THE NEW DECISIONS OF THE TARIFF COMMISSION AND THE NEED FOR LEGISLATIVE CLARIFICATION

*Carl H. Fulda\**

## I. GATT AND THE ESCAPE CLAUSE

THE General Agreement on Tariffs and Trade,<sup>1</sup> known as GATT, embodies the commitments of its contracting parties, now numbering eighty countries,<sup>2</sup> to enter "into reciprocal and mutual advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."<sup>3</sup>

The GATT provision that concerns us here is article XIX, which permits "Emergency Action on Import of Particular Products." Obviously, an international arrangement by which tariffs have been reduced in successive stages over the years is bound to create some hardships for importing countries. Accordingly, article XIX, paragraph 1(a) provides:

If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

The contracting party whose interest as exporter of the product concerned is affected by such "escape clause" action may suspend "substantially equivalent concessions or other obligations."<sup>4</sup> Language

---

\* Hugh Lamar Stone Professor of Law, University of Texas. J.U.D. 1931, University of Freiburg; LL.B. 1938, Yale University.—Ed.

1. 61 Stat. pt. 5, at A3 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 194. For recent studies see K. DAM, *THE GATT; LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

2. GATT Press Release No. 1091 (1971). Several other countries (most of them in Africa) apply the General Agreement on a de facto basis. GATT, 17th Supp. BASIC INSTRUMENTS AND SELECTED DOCUMENTS, at VII (1970) [hereinafter BISD].

3. GATT, Preamble.

4. GATT, art. XIX, para. 3(a).

similar in effect to the section of article XIX quoted above was incorporated by Congress into section 7 of the Trade Agreement Extension Act of 1951,<sup>5</sup> which remained in effect until 1962.<sup>6</sup>

## II. THE TRADE EXPANSION ACT OF 1962

The requirements for relief under the escape clause were made more severe by the Trade Expansion Act of 1962.<sup>7</sup> Upon request by the President, resolution by the congressional committees having jurisdiction over trade matters, its own motion, or petition by a trade association, firm, or union, the Tariff Commission shall

make an investigation to determine whether, as a result in major part of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry producing an article which is like or directly competitive with the imported article.<sup>8</sup>

. . . Increased imports shall be considered to cause, or threaten to cause, serious injury to the domestic industry concerned when the Tariff Commission finds that such increased imports have been the major factor in causing, or threatening to cause, such injury.<sup>9</sup>

This language has been held to establish four prerequisites for an affirmative finding with respect to an industry, on the basis of which the President "may proclaim such increase in, or imposition of, any duty or other import restriction on the article causing or threatening to cause serious injury to such industry as he determines to be necessary to prevent or remedy serious injury to such industry."<sup>10</sup> These prerequisites are

- (1) Imports of a like or competitive article produced by the domestic industry must be increasing;
- (2) The increased imports must be in major part the result of trade agreement concessions;
- (3) The domestic industry producing the like or competitive article must be suffering serious injury or be threatened with serious injury; and

---

5. Ch. 141, § 7, 65 Stat. 72, *repealed by* Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872.

6. See Metzger, *The Escape Clause and Adjustment Assistance: Proposals and Assessments*, 2 LAW & POLICY IN INTL. BUS. 352, 357-58 (1970).

7. Act of Oct. 11, 1962, Pub. L. No. 87-794, 76 Stat. 872, 19 U.S.C. §§ 1801-1991 (1970).

8. 19 U.S.C. § 1901(b)(1) (1970).

9. 19 U.S.C. § 1901(b)(3) (1970).

10. 19 U.S.C. § 1981(a)(1) (1970).

(4) The increased imports must be the major factor in causing or threatening to cause serious injury.<sup>11</sup>

This statute differs from the prior American law and from article XIX of GATT in two respects. First, to obtain tariff adjustments it is now necessary to show that increased imports were caused *in major part* by concessions under trade agreements. Prior to 1962 the Tariff Commission had to "determine whether any product upon which a concession [had] been granted under a trade agreement [was], *as a result, in whole or in part*, of the duty or other customs treatment reflecting such concessions, being imported into the United States in such increased quantities . . . as to cause or threaten serious injury to the domestic industry producing like or directly competitive products."<sup>12</sup> Under this pre-1962 language, it was easy to find that tariff concessions were *in part* the cause of increased imports. Indeed, the Tariff Commission seemed to have assumed without discussion that this causal relationship was present in every case.<sup>13</sup> Second, under the present law the concession-generated imports must be the *major factor* of actual or threatened serious injury to the industry. Prior to 1962 increased imports were to "be considered as the cause or threat of serious injury to the domestic industry producing like or directly competitive products when the Commission finds that such increased imports have *contributed substantially* toward causing or threatening to cause serious injury to such industry."<sup>14</sup> Thus the

11. See, e.g., Nonrubber Footwear, Tariff Commn. Publ. No. 359, at 6 (Jan. 1971) (views of Commissioners Clubb and Moore). The same enumeration is found in numerous other Commission reports explaining the statutory requirements.

12. Trade Agreements Extension Act of 1951, ch. 141, § 7(a), 65 Stat. 74 (emphasis added). The words "in whole or in part" seem in practical result identical with art. XIX, para. 1(a) of GATT, which cites as two causes for increased imports "unforeseen developments" and "tariff concessions."

13. See, e.g., Groundfish Fillets, Tariff Commn. Report No. 25, at 16 (May 1954): "[I]t is manifest that with a continuation of the present tariff treatment imports . . . will continue to capture an increasing share . . ." The duty under the Tariff Act of 1930 of 2-1/2¢ per pound had been reduced in 1938 to 1-7/8¢ on an annual tariff quota. There was no discussion whether the imports had been the result of the reduction in duty. *Accord*, Ferrocium (Lighter Flints) and All Other Cerium Alloys, Tariff Commn. Report No. 41 (Dec. 1955), in which "findings" that as a result of a 50% reduction in the 1930 tariff, imports had increased were not supported by any discussion. Concerning this attitude of the Commission, H.R. REP. NO. 1761, 85th Cong., 2d Sess. 9 (1958), stated:

The Committee considered the Tariff Commission's explanation of its understanding as to the necessary causal relationship, in escape clause cases, between the tariff concession in question and the increased imports. It agreed that the Commission is warranted in considering that, when increased imports of a product on which a concession has been granted cause serious injury, there is sufficient evidence that the level of the existing duty reflecting the concession contributes, in part, at least, to such increased imports.

14. Trade Agreement Extension Act of 1955, ch. 169, § 6, 69 Stat. 166 (1955) (emphasis added).

1962 Act established two causation requirements with a stiffer burden of proof for the industry seeking tariff relief.

But these were not the only changes in 1962. In addition to tariff adjustment for an industry, two new remedies were created. Firms and groups of workers were authorized to petition for adjustment assistance. To qualify for such individual relief the petitioners have to meet the same four prerequisites set forth above for tariff relief.<sup>15</sup> Moreover, the remedies provided for tariff adjustment and firm and worker adjustment may be combined: When the President receives a recommendation for tariff adjustment, he may also certify the firms and workers of such industry for individual adjustments or choose one or the other of these remedies.<sup>16</sup>

The substantive benefits of individual adjustment assistance are set forth in the statute in some detail.<sup>17</sup> They consist of technical, financial, and tax assistance for firms<sup>18</sup> and of trade readjustment and relocation allowances and training programs for workers.<sup>19</sup> The Secretaries of Commerce and Labor, respectively, are charged with administration and supervision.<sup>20</sup>

The two individual remedies were added because it was felt that tariff adjustment alone was insufficient to protect American firms and workers. The Committee on Ways and Means, in reporting the bill that became the Trade Expansion Act, explained:

Under current law no relief whatsoever is available to firms and workers injured by imports unless their injury is shared by a large part of their industry. Furthermore the granting of tariff adjustment in particular cases necessarily has an impact on our total foreign economic policy. It necessitates the granting of tariff compensation

---

15. 19 U.S.C. § 1901(c)(1)-(3) (1970) basically provides that firms and workers must show that "as a result in major part of concessions granted under trade agreements . . . an article like or directly competitive with an article produced by the firm" or "by such workers' firm, or an appropriate subdivision thereof," "is being imported . . . in such increased quantities as to cause, or threaten to cause, serious injury to such firm" or "unemployment or underemployment of a significant number . . . of the workers of such firm or subdivision." In both types of petitions it must be shown that the increased imports "have been the major factor in causing, or threatening to cause, such injury or unemployment or underemployment." Tariff Commission regulations with respect to the filing of petitions by industries, firms, and workers are found in 19 C.F.R. pt. 206 (1971).

16. 19 U.S.C. § 1902(a) (1970).

17. For a thorough analysis of "the substance of current adjustment assistance benefits" and "proposals for improvement under an expanded program," see Metzger, *supra* note 6, at 389-400.

18. 19 U.S.C. §§ 1911-20 (1970). See 15 C.F.R. §§ 610.1-42 (1971).

19. 19 U.S.C. §§ 1931-78 (1970). See 29 C.F.R. §§ 90.1-91.28 (1971).

20. This authority is found in various parts of 19 U.S.C. §§ 1902-78 (1970).

to our trading partners on other products in order to counterbalance whatever U.S. Tariffs are raised under the escape clause.<sup>21</sup>

Under this view relief to firms and workers is always a good thing, while upsetting tariff concessions and risking retaliation is something which should be reserved for grave situations only. This would be a plausible policy, but if Congress had wished to adopt it, it would surely have used different language in expressing the eligibility requirements for individual as distinguished from industry assistance. Since it used the same language, it is clear that the requirements for adjustment assistance to industries, firms, and workers were intended to be identical.<sup>22</sup>

### III. THE FIRST SEVEN YEARS UNDER THE 1962 ACT:

#### NO RELIEF FOR ANYONE

From the time of the enactment of the Trade Expansion Act through October 1969, no petitions for tariff adjustment or for adjustment assistance to firms or workers were granted. During that period there were thirteen petitions by industries,<sup>23</sup> eight petitions by firms,<sup>24</sup> and six petitions by workers.<sup>25</sup> Thus "we have played

21. H.R. REP. NO. 1818 (Trade Expansion Act of 1962), 87th Cong., 2d Sess. 13 (1962). See Metzger, *supra* note 6, at 379.

22. Professor Metzger, while chairman of the Tariff Commission, pointed out that the House Report (*supra* note 21, at 23) stated that the test for adjustment assistance to firms "is substantially the same" as that for tariff adjustments; he suggested that this similarity is not synonymous with identical, and, therefore, in borderline cases, the causation criterion should be relaxed in adjustment assistance cases. Supplementary statement of Chairman Metzger, Barbers' Chairs, Tariff Commn. Publ. No. 228, at 19-20 (Jan. 1968) (emphasis added). This suggestion has not been accepted by other members of the Commission. Professor Metzger conceded that his approach was not very precise and permitted "very limited leeway." *Id.* at 20.

23. Hatter's Fur, Tariff Commn. Publ. No. 82 (April 1963); Household China Tableware, Tariff Commn. Publ. No. 84 (April 1963); Earthenware Table & Kitchen Articles, Tariff Commn. Publ. No. 86 (April 1963); Softwood Lumber, Tariff Commn. Publ. No. 79 (Feb. 1963); Whisky, Tariff Commn. Publ. No. 89 (April 1963); Watches, Tariff Commn. Publ. No. 142 (Oct. 1964); Umbrellas, Tariff Commn. Publ. No. 136 (Sept. 1964); Ice Skates, Tariff Commn. Publ. No. 149 (Feb. 1965); Mushrooms, Tariff Commn. Publ. No. 148 (Jan. 1965); Eyeglass Frames, Tariff Commn. Publ. No. 219 (Oct. 1967); Barbers' Chairs, Tariff Commn. Publ. No. 228 (Jan. 1968); Broomcorn, Tariff Commn. Publ. No. 238 (March 1968); Canned Sardines, Tariff Commn. Publ. No. 291 (July 1969).

24. Barbers' Chairs, Tariff Commn. Publ. No. 229 (Jan. 1968); Barbers' Chairs, Tariff Commn. Publ. No. 230 (Jan. 1968); Household China Tableware, Tariff Commn. Publ. No. 85 (April 1963); Crude Petroleum, Tariff Commn. Publ. No. 134 (Aug. 1964); Plywood Door Skins, Tariff Commn. Publ. No. 162 (Oct. 1965) (Commission equally divided); Sodium Gluconate, Technical, Tariff Commn. Publ. No. 101 (July 1963); Ceramic Mosaic Tile, Tariff Commn. Publ. No. 85 (April 1963); National Tile & Mfg. Co., Tariff Commn. Publ. No. 145 (Dec. 1964) (Commission equally divided).

25. Unmanufactured Zinc, Tariff Commn. Publ. No. 81 (March 1963); Ceramic Mo-

false" with the expectations of the Congress that enacted the Trade Expansion Act of 1962 and particularly of those who relied on the promise of individual relief held out in that Act.<sup>26</sup>

This disappointment of expectations was attributable to the causation requirements of the 1962 Act, which, as explained above, required a finding that the increase of imports was due *in major part* to tariff concession and that such increases were the *major factor* in causing serious injury to industries and firms and in causing workers' unemployment. The first of the causation requirements—increase of imports due to concessions—was particularly troublesome. For instance, in its 1963 escape-clause investigation in *Softwood Lumber*,<sup>27</sup> the Commission said:

[M]aximum stimulation of imports attributable to a reduction in duty generally occurs directly or shortly after the reduced rates come into effect. The interval during which the reduction in duty operates to cause imports to continue rising varies with the commodity and attendant circumstances. In the instant case, some of the trade agreement reductions in duty were made as far back as 1936, and none were made more recently than 1948. The duty reductions made on softwood lumber so long ago can no longer be more than a negligible cause of lumber being imported in increased quantities . . . .<sup>28</sup>

Consequently, the Commission did not have to reach the issue whether there was serious injury caused in major part by the increased imports.<sup>29</sup>

In disposing of petitions for adjustment assistance by firms and workers, the Commission also made negative findings on both causation requirements.<sup>30</sup> In one case brought by a firm, two Commissioners who voted against relief stated that "the major factor" meant "the one that dominates the overall result," not merely the most

---

saic Tile, Tariff Commn. Publ. No. 115 (Nov. 1963); Transistor Radios, Tariff Commn. Publ. No. 91 (May 1963); Iron Ore, Tariff Commn. Publ. No. 96 (July 1963); Cotton Sheeting Workers, Tariff Commn. Publ. No. 100 (July 1963); Men's Leather Footwear, Tariff Commn. Publ. No. 232 (March 1968).

26. Statement of W. Wirtz, former Secretary of Labor, *Hearings on Foreign Trade and Tariff Proposals Before the Comm. on Ways and Means*, 90th Cong., 2d Sess. 38 (1968).

27. *Softwood Lumber*, Tariff Commn. Publ. No. 79 (Feb. 1963).

28. *Id.* at 10. *Accord*, Earthenware Table & Kitchen Articles, Tariff Commn. Publ. No. 86, at 5 (April 1963); Broomcorn, Tariff Commn. Publ. No. 238, at 3-4, 7 (March 1968).

29. *Softwood Lumber*, *supra* note 27, at 21. For discussion of other cases, see Banner, "In Major-Part"—*The New Causation Problem in the Trade-Agreements Program*, 44 TEXAS L. REV. 1331, 1336-43 (1966).

30. The decisions on firms' and workers' petitions are reviewed in Banner, *supra* note 29, at 1345-56.

important in a series of factors.<sup>31</sup> In a workers' case, the Commission rejected the argument that more liberal standards than those applicable to industry or firm investigations should be applied and denied the petition on the ground that eight years had elapsed since the last tariff concession.<sup>32</sup> Although these reductions maintained imports "at a higher level than would presumably have prevailed otherwise, . . . the major stimuli to increased imports in recent years are to be found primarily in factors other than the trade-agreement concessions."<sup>33</sup>

#### IV. THE FIRST DECISIONS BREAKING NEW GROUND

In November 1969 the Commission, with one dissent, granted for the first time three workers' petitions for adjustment assistance. The first, *Buttweld Pipe*,<sup>34</sup> involved the workers at a plant of the Armco Steel Corporation, whose multimillion dollar production complex capable of producing large quantities of welded pipe had been shut down. Imports had increased during the past ten years. The statutory duty rate of \$15 per ton prevailing in 1930<sup>35</sup> had been cut in half in 1948 and further reduced to \$6 in 1958. Commissioners Sutton, Thunberg, and Newsom explained that imports could compete with domestic products only if they were priced lower in order to compensate the buyer for longer delivery times, limited services, and the advance planning necessary for dealing with foreign suppliers.<sup>36</sup> The average landed value of imports during the five years preceding the shutdown was estimated to be from 9% to 19% lower than the average value of domestic shipments. Without the reduction of \$9 in import duties, *i.e., the total reductions below the 1930 rate*, import values would have been in the range of 4% to 13% below the average domestic values. Hence the increased imports had been stimulated in major part by the price advantage resulting from tariff concessions under GATT and the loss of 350 jobs was the result of these imports.<sup>37</sup> It should be noted that the largest concession was

---

31. National Tile & Mfg. Co., Tariff Commn. Publ. No. 145, at 7 (Dec. 1964).

32. Cotton Sheeting Workers, Tariff Commn. Publ. No. 100 (July 1963).

33. *Id.* at 7. The other factors were disparities between the costs of foreign and domestic fabricators and the price-support program of the Department of Agriculture.

34. *Buttweld Pipe*, Tariff Commn. Publ. No. 297 (Nov. 1969).

35. The 1930 statutory duty was one of the rates established by the Tariff Act of 1930, ch. 497, 46 Stat. 590. That Act, popularly known as the Smoot-Hawley Act, was the high-water mark of American protectionism. See C. FULDA & W. SCHWARTZ, *CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL TRADE AND INVESTMENT* 179 (1970).

36. *Buttweld Pipe*, *supra* note 34, at 5.

37. *Id.* at 4-5.



granted 21 years, and the latest, a relatively small one, 11 years prior to the filing of the petition.

A second opinion in the case by Commissioners Thunberg, Clubb, and Moore was even more explicit. It set forth the four requirements for relief under the statute, the large increase in imports from 1963 to 1968,<sup>38</sup> and then quoted the House and Senate Reports that explained the phrase "as a result of concessions granted under trade agreements" as meaning "the aggregate reduction which has been arrived at by means of a trade agreement or trade agreements (whether entered into under . . . this bill or under Section 350 of the Tariff Act of 1930)."<sup>39</sup> Accordingly, Commissioners Thunberg, Clubb, and Moore proclaimed the necessity to consider

the total reductions made since the beginning of the trade agreements program, not just the most recent reduction. . . . In determining whether the increased imports are a result "in major part" of the aggregate of concessions granted since 1934, we need ask ourselves only whether, *but for* the concessions, would imports be substantially at their present level.<sup>40</sup>

Answering this question in the negative, the three Commissioners emphasized that price was "the single most significant factor" in this market and that "about two-thirds of the importers' price advantage is occasioned by the trade agreements concessions."<sup>41</sup>

The "but for" test was also held applicable to the second causation requirement. The mill was said to be struggling with "inflation and other factors" that caused its cost to rise while "import competition from countries with a lesser rate of inflation tended to keep the price of its products down." Thus a mill which was "marginal even under normal circumstances became submarginal because of its inability to meet the price competition from imported pipe." Hence "but for the concession-generated increased imports this plant would probably have been able to stay in business."<sup>42</sup>

---

38. *Id.* at 7-8.

39. H.R. REP. NO. 1818, 87th Cong., 2d Sess. 46 (1962); S. REP. NO. 2059, 87th Cong., 2d Sess. 20 (1962), *quoted in* Buttweid Pipe, *supra* note 34, at 8-9 n.4.

40. Buttweid Pipe, *supra* note 34, at 9-10 (emphasis added). Nineteen thirty-four was the year of the enactment of the first Reciprocal Trade Agreement Act, Act of June 12, 1934, ch. 474, 48 Stat. 943. This Act granted authority to the President "to enter into foreign trade agreements with foreign governments . . . [and] to proclaim such modifications of existing duties and other import restrictions . . . as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder." There was a 50% limitation, upward or downward, on modifications of existing duties, and this limitation was continued in all subsequent statutes. *See* 19 U.S.C. § 1821(b) (1970).

41. Buttweid Pipe, *supra* note 34, at 10-11.

42. *Id.* at 12-13.

In *Transmission Towers and Parts*,<sup>43</sup> decided simultaneously with *Buttweld Pipe*, the Commission, again by votes of five to one, granted petitions by workers of the United States Steel Corporation's Pittsburgh and Los Angeles plants. The statutory rate of 20% had been lowered to 7.5% by reductions in 1935, 1948, and 1951 with a further reduction of 0.5% taking effect on January 1, 1968—a total reduction of 65%.<sup>44</sup> The price advantage of imported towers was \$44 per ton or more.<sup>45</sup> This was more than twice the differential permitted by regulations under the Buy American Act for purchase of foreign-made materials by federal agencies.<sup>46</sup> Accordingly, the majority concluded that but for the duty reductions imports would not have increased “in recent years”<sup>47</sup> and that unemployment would not have occurred but for the increased imports.<sup>48</sup>

Commissioner Leonard dissented in both the *Buttweld Pipe* and *Transmission Towers* cases.<sup>49</sup> He rejected the “but for” test as irreconcilable with the statutory language of “in major part,” which was designed to make relief available “only in exceptional circumstances.” Only Congress could liberalize these requirements.<sup>50</sup> Specifically, he pointed out in *Buttweld Pipe* that the plant had been built more than two years after the last tariff reduction took effect; therefore, the employer could not have been concerned about low tariffs. Moreover, the ratio of imports to domestic production remained steady except in 1968 with domestic production increasing along with imports. An extraordinary increase in imports in 1968 was due to the imminence of a strike in the steel industry that prompted customers to increase their inventories.<sup>51</sup> In *Transmission Towers*, Commissioner Leonard noted that there was no substantial connection between the duty reductions, which, in practical effect, ended in 1951 and the imports, which began to pick up fifteen years later.<sup>52</sup>

---

43. *Transmission Towers & Parts*, Tariff Commn. Publ. No. 298 (Nov. 1969) [hereinafter *Transmission Towers I*]. *Accord*, *Transmission Towers & Parts*, Tariff Commn. Publ. No. 316 (March 1970) (production at a modern plant had ceased because of loss of federal agency contracts to cheaper foreign suppliers).

44. *See* *Transmission Towers I*, *supra* note 43, at 11.

45. *Id.* at 4.

46. *See id.* at 4. Under the Buy American Act, 41 U.S.C. § 10(a)-(d) (1970), American materials are required for public use unless the head of the federal agency concerned determines that acquisition of American materials is “inconsistent with the public interest, or the cost . . . unreasonable.” *See* 41 C.F.R. § 1-6.104-4 (1971).

47. *Transmission Towers I*, *supra* note 43, at 10. No precise figures of increased imports were given.

48. *Id.* at 4.

49. *Buttweld Pipe*, *supra* note 34, at 16; *Transmission Towers I*, *supra* note 43, at 15.

50. *Transmission Towers I*, *supra* note 43, at 18.

51. *Buttweld Pipe*, *supra* note 34, at 17-18.

52. *Transmission Towers I*, *supra* note 43, at 22.

These decisions, coming after seven years of hopeless efforts, produced a veritable flood of new petitions, particularly by workers. Indeed, in 1970 and 1971, the Commission decided 110 workers' petitions, twenty-seven firm petitions (by relatively small enterprises), and eight industry petitions. Fourteen of the workers' petitions and five of the firm petitions were granted. The Commission was equally divided in twenty-five workers' cases; in all of these the President broke the tie vote and directed that assistance be granted.<sup>53</sup> With respect to firm petitions, the Commission was equally divided in seven cases: in all except one, decided in November 1971, the President has certified the firms as eligible. In the escape clause investigations, a majority of the Commission granted relief in one case; the Commission was equally divided in three cases and in two of these the President broke the tie vote. We must, then, try to analyze these decisions for the purpose of obtaining a comprehensive picture of the present state of the case law.

#### V. DECISIONS OF THE TARIFF COMMISSION SUBSEQUENT TO BUTTWELD PIPE AND TRANSMISSION TOWERS

The novelty of the *Buttweld Pipe* and *Transmission Towers* cases consists of the adoption of the "but for" test for measuring causation. This is a shorthand expression for a rather complicated problem: Is it necessary in order to find causation that increases in imports occur immediately or within a short time after tariff reductions take effect? Or is the length of the time interval between tariff reductions and increased imports irrelevant? If the interval is irrelevant, is it sufficient to show that maintenance of the statutory rate prevailing in 1930 would have prevented the present growth of imports? Could there still be reasons other than tariff concessions or increases in concession-generated imports that would destroy both causation requirements? Finally, what type of relief, if any, should

---

53. The President's authority to break a tie vote, never exercised by Presidents Kennedy and Johnson, is based on § 330(d) of the Tariff Act of 1930, 19 U.S.C. 1330(d) (1970), which applies to "any case calling for findings of the Commission in connection with any authority conferred upon the President by law to make changes in import restrictions . . . ." A petition for tariff adjustment under the escape clause obviously presents such a case. Petitions for adjustment assistance by firms and workers, however, do not lead to "changes in import restrictions." Hence, Commissioners Sutton, Leonard, and Newsom have contended that the "tie vote" provision does not apply in such cases. Women's & Misses' Dress Shoes with Leather, Vinyl or Fabric Uppers, Tariff Commn. Publ. No. 323, at 7-10 (June 1970); Men's, Youth's & Boys' Footwear of Leather, Tariff Commn. Publ. No. 324, at 7-9 (June 1970). The Attorney General advised the President that he has authority to break tie votes in firms' and workers' cases. White House Press Release of Oct. 7, 1970, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1345 (1970). The Attorney General's memorandum has not been published.

be granted? The following brief analysis of the Commission's decisions will consider how these questions have been answered.

### A. *Escape Clause Cases*

In *Pianos and Parts Thereof*,<sup>54</sup> a majority of three Commissioners recommended that the industry be given tariff relief. Imports began to increase in the mid-fifties. The statutory tariff had been cut in half in 1951. This cut was followed by minor reductions during the period of 1956 to 1958 and further reductions of 2% and 1.5% on January 1, 1968, and January 1, 1969, respectively.<sup>55</sup> Commissioners Clubb and Moore, citing their opinions in the *Buttweld Pipe and Transmission Towers* cases, applied the "but for" test;<sup>56</sup> Commissioner Leonard, concurring, did not.<sup>57</sup> He observed that the most dramatic upsurge of imports had followed the Kennedy Round reductions in 1968 and 1969. (Imports increased in 1968 by more than 70% and in 1969 by more than 100% over the 1965-1967 average.) He noted that there were reasons other than these increased imports<sup>58</sup> for the idling of capacity, the losses by one third of the firms, and the decline in employment, but held that the spectacular recent rise in imports was the major factor in threatening to cause serious injury.<sup>59</sup> The two dissenters denied such a threat, arguing that "relatively low profit rates" were accompanied by stable demand.<sup>60</sup> The President suspended tariff reductions, which were scheduled to take effect in 1970, 1971, and 1972, and authorized firms and workers to apply for adjustment assistance.<sup>61</sup> It should be noted that, as Commissioner Leonard's opinion indicates, the "but for" test was not necessary to reach an affirmative finding in this case.

*Barbers' Chairs and Parts Thereof*<sup>62</sup> was an atypical escape clause

54. *Pianos & Parts Thereof*, Tariff Commn. Publ. No. 309 (Dec. 1969). Five Commissioners voted; one was absent.

55. *Id.* at 5.

56. *Id.* at 5.

57. *Id.* at 9.

58. *Id.* at 13. "The changing pattern of life in the United States," (e.g., "growing interest in other musical instruments and many other kinds of recreation").

59. *Id.* at 10-11.

60. *Id.* at 23.

61. Proclamation No. 3964, 35 Fed. Reg. 3645 (1970). See White House statement accompanying the proclamation in 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 261, 262 (1970), stressing that this was a case "for which adjustment assistance was meant to apply."

62. *Barbers' Chairs & Parts Thereof*, Tariff Commn. Publ. No. 319 (April 1970) [hereinafter *Barbers' Chairs I*]. In a preceding investigation the Commission had denied relief. *Barbers' Chairs*, Tariff Commn. Publ. No. 228 (Jan. 1968). The industry consisted of only two firms, one of which was doing well. The increase in imports was

case in which the Commission was equally divided. One of the two domestic firms had been absorbed by the principal Japanese exporter of barber chairs who had thus obtained a dominant position in the United States market, which he exploited by raising his prices. The three Commissioners, voting against relief for the remaining American-owned firm, attributed that firm's serious injury to inefficiency and to unlawful conduct by its Japanese rival;<sup>63</sup> hence trade concessions and increased imports were irrelevant. Indeed, it would appear that the acquisition by the Japanese producer of an American firm in an industry consisting of only two firms of equal size was a violation of section 7 of the Clayton Act.<sup>64</sup> In any event, there was only one firm that needed relief; therefore individual adjustment assistance was the proper remedy.<sup>65</sup>

*Nonrubber Footwear*,<sup>66</sup> an investigation undertaken at the request of the President, resulted in an equally divided report on which the President took no action. Commissioners Clubb and Moore based their affirmative votes on the "but for" test that they had previously espoused<sup>67</sup> but they could not garner additional votes because

---

attributed to the rise of Japan as an industrial power, the effective distribution in the United States of Japanese imports, and the reduction in ocean freight rates.

63. Barbers' Chairs I, *supra* note 62, at 10-11.

64. Compare *United States v. Monsanto Co.*, 1967 Trade Cas. ¶ 72,001 (W.D. Pa. 1967), in which a joint venture between Monsanto and a leading German chemical firm was prohibited because of its adverse effect on competition in the United States. For comments on the case, see the statement by E.M. Zimmerman, Assistant Attorney General, Antitrust Division, in *Hearings on International Aspects of Antitrust Before the Subcomm. of Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 502 (1966).

65. In the petition filed by the Emil J. Paidar Co., Barbers' Chairs & Parts Thereof, Tariff Commn. Publ. No. 320 (April 1970), the three Commissioners who had voted against relief in the escape clause investigation again voted to deny relief. *Id.* at 4. Commissioners Clubb, Moore, and Thunberg voted for relief on the ground that the most recent reduction in duties from 10% to 8% ad valorem had made Paidar's situation hopeless. *Id.* at 7-8, 14. The President authorized adjustment assistance "for current operations and to expand production of other types of professional equipment," but refused tariff relief because it would "curtail imports." White House statement of June 23, 1970, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 808 (1970).

66. *Nonrubber Footwear*, Tariff Commn. Publ. No. 359 (Jan. 1971), noted in Recent Decision, 7 TEXAS INTL. L.J. 163 (1971).

67. *Nonrubber Footwear*, *supra* note 66, at 13. The duties on 60% of the men's footwear and 55% of the women's footwear imports were cut from the statutory level of 20% and 35%, respectively, to 8.5% and 6%, respectively. In the first category there were no cuts between 1943 and 1968; in the second category the first cut occurred in 1963. One hundred thirteen firms had sustained losses, output and profits of others declined, and imports accounted for one third of the United States market. This situation constituted a threat to the American industries involved, which could be remedied by tariff increases on four items and "an adjustment assistance program" for firms and workers. *Id.* at 24a.

See also *Bagatelle, Billiard & Pool Balls*, Tariff Commn. Publ. No. 374 (March 1971), in which there was a unanimous negative finding. Commissioners Clubb and Moore

only four Commissioners participated in the decision.<sup>68</sup> Commissioners Sutton and Leonard voted in the negative. They pointed out that the time lag between the concessions and the increased imports was so long as to negate causation and that the Kennedy Round reductions, which began on January 1, 1968, were irrelevant because imports increased sharply prior to that date.<sup>69</sup> Moreover, the bulk of the reductions on the most important items on women's shoes was attributable to the adoption of the Tariff Schedules of the United States and not to the Kennedy Round.<sup>70</sup> Commissioner Leonard called attention to the disparity between United States and foreign wage rates, limited gains in American productivity, and rapid United States price increases, all of which he considered more important factors than tariff reductions.<sup>71</sup> In short, the erosion of American competitiveness was primarily due to inflation.

It should be noted that shortly before this decision was handed down the House of Representatives passed The Trade Act of 1970,<sup>72</sup> a bill that provided for mandatory quotas on "the total quantity of each category of textile articles and . . . of footwear articles . . . produced in any foreign country which . . . shall not exceed the average annual quantity of such category produced in such country and entered during 1967, 1968, and 1969." The bill died in the Senate with the expiration of the Ninety-first Congress. The contrast between this very drastic measure, which would have violated the prohibition of quotas in article XI, paragraph 1 of GATT,<sup>73</sup> and the modest proposals for industry relief by Commissioners Clubb and Moore,<sup>74</sup> who found no present injury but only a threat of injury, is most striking. It shows that even the members of the Tariff Commission most inclined to grant industry and individual relief are likely to recommend measures far more compatible with the

---

found the first causation requirement satisfied by the "but for" test, but found no causation of serious injury. *Id.* at 4-6. Commissioners Sutton and Leonard denied first causation on the ground that the concessions were made 25 years ago. *Id.* at 3.

68. At the time of this decision the office of chairman was vacant, and Commissioner Young did not participate.

69. Nonrubber Footwear, *supra* note 66, at 38.

70. *Id.* at 29.

71. *Id.* at 44-45.

72. H.R. 18970, 91st Cong., 2d Sess., § 201(a) (1970).

73. See Fulda, Book Review, 69 MICH. L. REV. 783, 784 (1971).

74. Commissioners Clubb and Moore recommended that the minor tariff reductions of the Kennedy Round on the most important item of men's footwear be cancelled, and that the tariff which was in effect in 1969 on three items of women's footwear be maintained, thus eliminating the reductions scheduled for 1970, 1971, and 1972. Nonrubber Footwear, *supra* note 66, at 14, 17, 24a.

GATT system of liberalized trade than a Congress bending under protectionist pressures. The escape clause and individual adjustment assistance thus provide a necessary safety valve without which trade liberalization could not continue.

The remaining recent decisions further illustrate that the ravages of United States inflation exceed the damage attributed to tariff concessions. Indeed, in *Umbrellas and Metal Parts*,<sup>75</sup> Commissioners Clubb and Moore observed that "even the imposition of the 1930 rates of duty would not have substantially affected U. S. imports of umbrellas"<sup>76</sup> because average wholesale prices of imports would still be \$17 per dozen cheaper than domestic articles.<sup>77</sup> Similarly, in *Flat Glass and Tempered Glass*,<sup>78</sup> it was noted that the increase in prices of glass in the domestic market "has eroded materially the protective effect of U. S. import duties"<sup>79</sup> and "made the U. S. market attractive to foreign suppliers."<sup>80</sup> In this case, the Commission denied relief for four types of glass products but was equally divided in regard to sheet glass, which the majority considered to be a separate industry. Sheet glass had been the subject of escape clause relief in 1962,<sup>81</sup> which had been terminated for some items and reduced for others in 1967.<sup>82</sup> These reduced increases were scheduled to expire on March 31, 1970.<sup>83</sup> Three Commissioners recommended relief for sheet glass on the ground that the 1967 modifications of the escape clause relief were the major cause of increased imports,<sup>84</sup> which in turn caused a downward trend in profits.<sup>85</sup> They were, however,

---

75. *Umbrellas & Metal Parts Thereof*, Tariff Commn. Publ. No. 334 (Aug. 1970) (relief denied by 3-to-1 vote).

76. *Id.* at 5.

77. The average wholesale price of imported umbrellas at the statutory rate of 40% ad valorem would be \$21 per dozen, compared with \$38 per dozen for domestically produced products. *Id.* at 6. The duty for umbrellas was cut in half in 1950. *Id.* at A-4.

78. *Flat Glass & Tempered Glass*, Tariff Commn. Publ. No. 310 (Dec. 1969) (relief denied by 4-to-2 vote in the cases of rolled, plate, float, and tempered glass).

79. *Id.* at 40.

80. *Id.* at 41.

81. Proclamation No. 3455 of March 19, 1962 (76 Stat. 1454); Proclamation No. 3458 of March 27, 1962 (76 Stat. 1457). Proclamation No. 3548 of Aug. 21, 1963 (77 Stat. 1017) pursuant to § 102 of the Tariff Classification Act of 1962 (19 U.S.C. § 1202 (1970)), incorporated the increased duties into the Tariff Schedules of the United States.

82. Proclamation No. 3762 of Jan. 11, 1967 (81 Stat. 1076).

83. Proclamation No. 3816 of Oct. 11, 1967 (81 Stat. 1139); Proclamation No. 3951 of Dec. 24, 1969, 34 Fed. Reg. 20381 (1969).

84. *Flat Glass & Tempered Glass*, *supra* note 78, at 7. See also *Sheet Glass (Blown or Drawn Flat Glass)*, Tariff Commn. Publ. No. 306 (Dec. 1969).

85. *Flat Glass & Tempered Glass*, *supra* note 78, at 29. Commissioner Thunberg held that sheet glass was not a separate industry (*id.* at 19); Commissioner Leonard observed that decreased demand for sheet glass was not due to imports, but to increased

divided about the appropriate remedy: Commissioners Sutton and Moore recommended imposition of the statutory rates<sup>86</sup> while Commissioner Clubb favored adjustment assistance to firms and workers rather than import restrictions.<sup>87</sup> The President followed the latter course by directing the Secretaries of Commerce and Labor to certify eligible workers and firms for assistance. He also directed continuation of the escape clause relief until January 31, 1972; thereafter it was to be phased out in a two-year period.<sup>88</sup> The Commission has advised the President that a partial termination of the escape clause relief would adversely affect the sheet glass industry.<sup>89</sup>

*Marble and Travertine Products*<sup>90</sup> resulted in an equally divided Commission. Chairman Bedell<sup>91</sup> and Commissioner Moore recommended tariff increases that would restore the statutory rate for two items and exceed it with respect to one item.<sup>92</sup> They argued that the "but for" test required this result while Commissioners Leonard and Young stressed that imports did not increase until ten years after the rates were cut in half.<sup>93</sup> In their view, domestic inflation was the primary factor.<sup>94</sup> Indeed, the data relied on by all four Commissioners indicated that restoration of statutory duties would not eliminate the price advantage of the imported articles.<sup>95</sup> For that reason, and because he did not want to increase domestic construction costs, the President refused to proclaim tariff increases but asked the Secretaries of Labor and Commerce to consider requests for adjustment assistance by individual firms and workers.<sup>96</sup> In the

---

competition of float glass (*id.* at 35); Commissioner Newsom denied the existence of serious injury (*id.* at 43).

86. *Id.* at 11.

87. *Id.* at 31 ("[I]njury has been unevenly felt within the industry. Certain aggressive firms with modern plants are very healthy and need no assistance to compete effectively . . .").

88. Proclamation No. 3967 of Feb. 27, 1970, 35 Fed. Reg. 3975-77 (1970); White House Press Release, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 287 (1970).

89. Sheet Glass (Blown or Drawn Flat Glass), Tariff Commn. Publ. No. 449 (Dec. 1971). For subsequent developments see Proclamation No. 4102 of Jan. 29, 1972, 37 Fed. Reg. 2417; Flat Glass and Tempered Glass, Tariff Commn. Publ. No. 459 (Jan. 1972).

90. Marble & Travertine Products, Tariff Commn. Publ. No. 420 (Sept. 1971).

91. Commissioner Clubb's term had expired.

92. Marble & Travertine Products, *supra* note 90, at 16.

93. *Id.* at 19.

94. *Id.* at 23.

95. *Id.* at 21. Significantly, the opinion by Chairman Bedell and Commissioner Moore, which recommended tariff relief, includes a table showing price comparisons on four domestic job sites, for three of which the delivered prices of foreign materials, taxed at the statutory rate, would be considerably lower than for domestically fabricated goods. *Id.* at 12.

96. 8 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 148 (1972). The President also



last industry case of 1971, *Television Receivers and Certain Parts Thereof*,<sup>97</sup> five Commissioners denied relief on the ground that the increased imports were due in major part to dumping rather than to trade concessions.

It thus appears that the decisions on industry petitions since the end of 1969 dramatize the erosion of American competitiveness resulting from domestic inflation. Indeed, there could be no more drastic evidence of this fact than the finding in some cases that restoration of the 1930 duties, the highest in United States history,<sup>98</sup> would not be sufficient protection. It should also be noted that in three of the industry investigations individual adjustment was chosen as the most appropriate remedy. Significantly, in two of these cases, the industry relief ultimately adopted consisted only of maintenance of the status quo by postponement of future reductions or continuation of previously granted escape clause relief that otherwise would have expired. Last, but not least, in none of these decisions did the "but for" test prevail.

### B. *Firm Petitions*

In two cases involving producers of *Stainless-Steel Table Flatware*,<sup>99</sup> causation presented no difficulties. In October 1967 the President allowed a tariff quota that had been in effect for eight years to expire, thus re-establishing the trade agreement concessions that had been suspended as a result of the escape clause action.<sup>100</sup> Immediately thereafter, imports increased rapidly from 9.2 million dozen pieces during the last year of the tariff quota to 34.4 million in 1970.<sup>101</sup> Substantial operating losses were suffered because of the preference for foreign supplies by the customers of the two firms.<sup>102</sup> Under these circumstances, the unanimous grant of adjustment as-

---

decided to seek elimination of tariffs on unfinished marble imports, which are vital to domestic production. This may be the first time that a liberalizing measure was recommended as an answer to an escape clause petition.

97. *Television Receivers & Certain Parts Thereof*, Tariff Commn. Publ. No. 436 (Nov. 1971).

98. See note 35 *supra*.

99. *Stainless-Steel Table Flatware*, Tariff Commn. Publ. No. 393 (May 1971) [hereinafter *Flatware I*]; *Stainless-Steel Table Flatware*, Tariff Commn. Publ. No. 414 (Aug. 1971). A workers' petition by the employees of the firm involved in *Flatware I*, *supra*, was granted in *Stainless-Steel Table Flatware*, Tariff Commn. Publ. No. 442 (Dec. 1971).

100. See 19 U.S.C. § 1981(c)(1) (1970).

101. *Flatware I*, *supra* note 99, at 3-4.

102. A workers' petition involving three idle plants of the International Silver Co. had previously been granted. *Stainless-Steel Table Flatware*, Tariff Commn. Publ. No. 347 (Dec. 1970).

sistance was a foregone conclusion under any conceivable interpretation of the statute. Indeed, as a result of negotiations with the interested contracting parties of GATT, the President re-established a tariff quota for stainless steel.<sup>103</sup>

Similarly uncontroversial, at least with respect to the first causation requirement, is the recent decision in *Cotton Osnaburgs and Sheetings*.<sup>104</sup> Imports of coarse cotton sheeting, the principal product of the petitioner, had increased at an annual rate of 22% from 1964 to 1970. The current rates of duty were 40% less than in 1930. The major concessions had occurred in 1948 and 1956 followed by annual minor Kennedy Round concessions beginning in 1968.<sup>105</sup> However, there was evidence that in this highly competitive market "a small price difference, even of one fourth of a cent in the case of some types, may well be sufficient to determine whether a sale is made or lost."<sup>106</sup> The profit position of petitioner's plant, which closed in June 1971, deteriorated during the period of implementation of the Kennedy Round.<sup>107</sup> Under these circumstances, four Commissioners concluded that the recent Kennedy Round reductions in duties were the major cause of the increased imports, which in turn were responsible for the collapse of the firm and the unemployment of its workers.<sup>108</sup> The dissenters objected only to the second finding of causation; in their view the loss of military business and domestic competition rather than increased imports were to blame for the petitioner's misfortune.<sup>109</sup>

When recent increases in imports are not or cannot be attributed

103. Proclamation No. 4076 of Aug. 21, 1971, 36 Fed. Reg. 16561 (1971).

104. *Cotton Osnaburgs & Sheetings*, Tariff Commn. Publ. No. 426 (Oct. 1971).

105. *Id.* at 4-5.

106. *Id.* at 6. In *Women's & Misses' Dress Shoes*, Tariff Commn. Publ. No. 323 (June 1970), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 618 (1971), the three Commissioners voting in favor of adjustment assistance for the firm and workers noted that modest concessions can cause the demise of marginal operators. *Id.* at 13. *Accord*, *Women's Dress Shoes*, Tariff Commn. Publ. No. 379 (April 1971), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 618 (1971). *Compare* *Women's Vinyl Sandals*, Tariff Commn. Publ. No. 437 (Nov. 1971) (one cent a pair reduction in duty could not have caused 19 million pair increase in imports; low labor costs were more important than tariff reductions).

107. *Cotton Osnaburgs & Sheetings*, *supra* note 104, at 7.

108. *Id.* at 5-6. The majority opinion in *Certain Yarns, Fabrics & Other Textile Products*, Tariff Commn. Publ. No. 432 (Nov. 1971), follows *Cotton Osnaburgs*. The two dissenters attributed the manufacturer's troubles to difficulties in modernizing its plant and denied that either of the causation requirements had been met. *Certain Yarns*, *supra*, at 12-13, 28-29. One of the dissenters wrote a letter to the President accusing the Commission of procedural irregularities.

109. *Cotton Osnaburgs & Sheetings*, *supra* note 104, at 10-12. On that ground a unanimous Commission denied the petition in *Certain Cotton Yarns & Fabrics*, Tariff Commn. Publ. No. 375 (March 1971).

to recent trade concessions, petitioners face a more complicated problem, as illustrated by the three-to-one vote in *Certain Woven Fabrics*.<sup>110</sup> The company had closed its mill at the end of 1969 following three years of operating losses. Duties on the type of cotton cloth that the firm was making had decreased from 1930 to 1969 by about one third, the largest reduction having occurred in 1955. Imports of cotton cloth during the latter part of the sixties were several times greater than in 1955. As to fabrics of man-made fibers, the major reductions of tariffs occurred in 1936, 1948, and 1951 but import increases became substantial only in 1959 and have grown ever since.<sup>111</sup> Commissioners Sutton, Clubb, and Moore held that the firm's injury had been caused by concession-generated increased imports, which had deprived it of customers and prevented it from shifting to fabrics outside its customary line.<sup>112</sup> Commissioner Leonard's dissent denied causation on both counts. He noted that the bulk of the reduction in rates was made long before there was any significant increase in imports, that some imported shirts would undersell like domestic products even if the 1930 rate were to be restored, and that lower foreign labor costs and the company's inability to adapt itself to changes in demand that occur every five or six years were the major causes of the shutdown.<sup>113</sup> Although the "but for" test was not explicitly mentioned in either opinion, it would seem that the majority relied on it because they ignored the time lag between concessions and increased imports and because there was a disagreement about the causes of the company's shutdown.

In three of the cases in which the President broke a tie vote by ordering relief, there were votes by Commissioners Clubb and Moore for petitioners based on the "but for" test, and votes by Commissioners Sutton and Leonard against petitioners rejecting the "but for" test. *Coils and Antennas*<sup>114</sup> involved a plant producing component parts for radio and television receivers that were competitive with imported parts. Imports had tripled between 1966 and 1970. The major duty reductions, accounting for 75% of total reductions, oc-

---

110. *Certain Woven Fabrics*, Tariff Commn. Publ. No. 342 (Nov. 1970) [hereinafter *Woven Fabrics*]. A petition by workers of the same company was granted in *Certain Woven Fabrics*, Tariff Commn. Publ. No. 357 (March 1971).

111. *Woven Fabrics*, *supra* note 110, at 4.

112. *Id.* at 4-5.

113. *Id.* at 8-9. On the same grounds three Commissioners voted for denial in *Men's & Boys' Shirts, Not Knit*, Tariff Commn. Publ. No. 439, at 9 (Nov. 1971). Three other Commissioners voted for relief. *Id.* at 3. As of Feb. 1, 1972, the President had not acted.

114. *Coils & Antennas*, Tariff Commn. Publ. No. 385 (April 1971) (Commission equally divided), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 854 (1971).

curred more than two decades ago, long before these items became significant articles of commerce.<sup>115</sup> On that basis, the issue between the proponents and opponents of the "but for" test was clearly drawn. The President made the ultimate decision for the proponents. The equal division was due to one vacancy and one Commissioner's absence.<sup>116</sup>

Practically on all fours are two other cases in which two vacancies on the six-member Commission produced equal division, thus permitting the President to intervene: *High Fidelity Stereo and Related Equipment*<sup>117</sup> and *Electrolytic Capacitors*.<sup>118</sup> But in a later case involving another firm that produced capacitors, the petition was denied by a two-to-one vote.<sup>119</sup> Since Commissioners Clubb and Young did not participate, Commissioners Sutton and Leonard, opponents of "but for," constituted the majority. Hence the President could not act.

These decisions indicate that sharp increases in imports during the latter part of the 1960's, when the inflationary boom accelerated,<sup>120</sup> are being evaluated differently by different groups of Commissioners. Those who hold that these increases would not have occurred if the tariff rates of 1930 had not been reduced and who also find serious injury or a threat thereof will prevail when absences or vacancies place them in the majority or when the President breaks a tie vote.

In some cases, the "but for" advocates were in the minority. For instance in *Women's Casual Shoes*,<sup>121</sup> relief was denied by a two-to-

---

115. *Id.* at 3-4.

116. At the time of this decision the office of chairman was vacant and Commissioner Young did not participate.

117. *High Fidelity Stereo & Related Equipment*, Tariff Commn. Publ. No. 355 (Jan. 1971), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 475 (1971). Increases in imports occurred from 1965-1969; principal reductions in duties ended in 1951, followed by 1/2% reductions in the Kennedy Round. Commissioners Sutton and Leonard held that even at the statutory rate imported products would still be cheaper than domestic ones (*id.* at 5), while Commissioners Clubb and Moore, espousing the "but for" test, stated that the price differential in favor of imports was equal to duty reduction (*id.* at 9). This was a disagreement about the evidence: It would, of course, be consistent with the "but for" test to deny causation if the price differential in favor of imports would persist even if the statutory rates were restored.

118. *Electrolytic Capacitors*, Tariff Commn. Publ. No. 335 (Aug. 1970), *relief granted*, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1345 (1970). The statutory duty of 35% had been reduced in 1951 to 12.5%. Kennedy Round reductions in the late sixties were minor. Commissioners Clubb and Moore held that imports would not have increased if the 1930 rate had remained in effect.

119. *Capacitors & Semiconductors*, Tariff Commn. Publ. No. 394 (May 1971). Petitions by the workers of the same company were denied in *Capacitors & Semiconductors*, Tariff Commn. Publ. No. 395 (May 1971).

120. See *The Troubles of U.S. Trade*, MORGAN GUARANTY SURVEY, Sept. 1971, at 3, 6-7.

121. *Women's Casual Shoes*, Tariff Commn. Publ. No. 405 (July 1971). A practically

one vote with two vacancies and one absence.<sup>122</sup> Both sides referred to their respective opinions in *Nonrubber Footwear*.<sup>123</sup>

There have also been unanimous denials of firm petitions. In one case involving women's shoes,<sup>124</sup> there was the usual division with regard to the first causation requirement<sup>125</sup> but unanimity in finding the absence of serious injury or threat thereof.<sup>126</sup> In another case relating to similar articles, the difficulties of the firm, which was still in operation, were attributed to specialization in high priced shoes, for which import competition was not severe, and to the domestic recession.<sup>127</sup> The Commission denied any connection between increased imports and trade concessions in the case of articles that have been on the free list with a commitment by the United States to keep them there.<sup>128</sup>

The question whether a domestic article is "like or directly competitive with the imported article"<sup>129</sup> has been raised in several cases involving imports of component parts of finished products. According to what seems to be the majority view, the requirement is not met, and the case must consequently be dismissed, when imports of the component parts that are competitive with domestically manufactured parts have not increased; the fact that imports of finished products containing the component parts have increased is deemed

---

identical case is *Women's Dress Shoes*, Tariff Commn. Publ. No. 416 (Aug. 1971), in which a 2-to-1 majority denied relief. *See also* *Men's & Women's Footwear*, Tariff Commn. Publ. No. 419 (Sept. 1971), in which a 3-to-1 majority denied relief. Chairman Bedell and Commissioner Young concluded that the cause of injury was not increased imports but domestic competition and changes in styles. *Id.* at 4. Commissioner Moore, dissenting (*id.* at 9), referred to his opinion in *Nonrubber Footwear* (discussed in text accompanying note 67 *supra*).

122. Commissioners Sutton and Leonard formed the majority, Commissioner Moore dissented, and Commissioner Young did not participate.

123. *Women's Casual Shoes*, *supra* note 121, at 3, 6. For a discussion of *Nonrubber Footwear*, see text accompanying notes 66-71 *supra*.

124. *Women's Dress Shoes*, Tariff Commn. Publ. No. 388 (April 1971).

125. *Id.* at 3 (Commissioners Sutton and Leonard holding increased imports not in major part a result of concessions), 5 (Commissioners Clubb and Moore holding increased imports were in major part a result of concessions).

126. *Id.* at 3, 5. In *Men's Footwear*, Tariff Commn. Publ. No. 427, at 3 (Oct. 1971), "a small net loss" after three profitable years was held not to amount to injury or a threat thereof.

127. *Women's Dress Shoes*, Tariff Commn. Publ. No. 411 (July 1971). *See also* *Men's Dress Shoes*, Tariff Commn. Publ. No. 421 (Sept. 1971) (imports not the major factor when the company, after closing its plant, purchased 90% of its requirements from domestic manufacturers and imported the balance).

128. *Manual Office Typewriters*, Tariff Commn. Publ. No. 358 (Jan. 1971).

129. 19 U.S.C. § 1901(b)(1) (1970). *See also* 19 U.S.C. § 1901(c)(1)-(2) (1970). "Directly competitive with" is defined in 19 U.S.C. § 1806(4) (1970).

irrelevant.<sup>130</sup> On the other hand, some cases hold that parts imported as components of finished products are competitive with parts manufactured by domestic producers.<sup>131</sup> The latter view would seem to be preferable, provided it can be shown that increased imports of the finished products have injured domestic producers and their suppliers.

Finally, in a recent case the Commission unanimously denied a petition by a firm organized in 1969, which had purchased a plant that had previously incurred substantial losses.<sup>132</sup> The unfavorable operating results were found to be due to a change in customer preferences: mass-produced photographic lenses, formerly the principal products of the plant, had lost popularity in favor of more sophisticated and more costly products. Imports, stimulated at least to some degree by Kennedy Round concessions, increased prior to the takeover of the plant by petitioner but not thereafter. The Commission's conclusion that increased imports were not the major factor causing or threatening to cause injury to the firm was, therefore, based not only on the finding of "changes in the product-mix,"<sup>133</sup> but also on the novel proposition that a newly organized firm operating in a plant acquired from another firm must be presumed to be aware of the threat of imports that the selling firm had to face.<sup>134</sup> In other

---

130. See Paper Cones for Loudspeakers, Tariff Commn. Publ. No. 362 (Feb. 1971), in which relief was denied unanimously in four concurring opinions. Commissioner Sutton observed that paper cones were not being imported as such and that "it is wholly untenable . . . to regard loudspeakers, radios, television receivers, or other fabricated goods having paper cones as component parts thereof as being paper cones at a later stage of processing." *Id.* at 9. See also Certain Variable Electrical Capacitors, Tariff Commn. Publ. No. 423 (Oct. 1971) (unanimous denial). In Heels, Soles & Soling Sheets, Tariff Commn. Publ. No. 441 (Dec. 1971), Commissioners Parker and Leonard accepted this view, saying "a shoe cannot be deemed to be a heel . . ." *Id.* at 7. Commissioners Moore and Young denied relief on other grounds. *Id.* at 5.

131. Electronic Transformers, Tariff Commn. Publ. No. 351 (Jan. 1971) (workers' petition granted by 2-to-1 vote). See also Coils & Antennas, Tariff Commn. Publ. No. 385 (April 1971) (Commission equally divided), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 854 (1971). The Electronics Transformers case was cited by Commissioner Moore in his dissent in Heels for Women's Footwear, Tariff Commn. Publ. No. 440, at 10 (Nov. 1971).

132. Optical Elements, Tariff Commn. Publ. No. 425 (Oct. 1971).

133. *Id.* at 4.

134. *Id.* at 5. *Accord*, Certain Bovine Leather, Tariff Commn. Publ. No. 433, at 7 (Nov. 1971). Other reasons for the denial in Bovine Leather were obsolete facilities and the fact that the firm was a processor but not a producer and 19 U.S.C. § 1901(c)(1) (1970) (which delineates the requirements for adjustment assistance) applies only to producers. *Id.* at 3-6. This was the first holding interpreting the statute so narrowly. Petitioner was tanning hides according to the specifications of his customer, and this operation was held to be a service. The legislative policy would be better served if the tanning were considered tantamount to production.

words, the acquiring firm cannot ground its petition for adjustment assistance on the fact that it has made a bad bargain; its request for relief must be founded on facts that developed after the acquisition. This proposition seems thoroughly sound.

### C. *Workers' Petitions*

#### 1. *Relief Granted by the Commission*

Subsequent to the path-breaking *Buttweld Pipe* and *Transmission Towers* decision discussed above,<sup>135</sup> the Commission granted additional workers' petitions. Relief in some of the subsequent cases might have been granted even if those prior cases had not been decided the way they were. Two cases grew out of the escape clause investigation of *Pianos and Parts Thereof*;<sup>136</sup> both stressed that the increases in imports coincided with Kennedy Round reductions and that customers of the now closed plants had turned to imports.<sup>137</sup>

In two other successful workers' petition cases, the employers themselves had begun to substitute imports for their own production; this practice was held to be the major factor for petitioners' unemployment.<sup>138</sup> The reasons for switching to imports were not explained; the result is convincing only if it is assumed that the increase of concession-generated imports<sup>139</sup> forced the employers to curtail or abandon their own production.

Only two grants to workers and one to salaried employees rested explicitly on the "but for" doctrine, that if the 1930 rates had not been reduced imports would not have reached their present levels, and that the unemployment would not have occurred if the imports had not increased.<sup>140</sup> It is noteworthy that in one of these reports the majority, consisting of Commissioners Thunberg, Clubb, and

---

135. See pt. IV. *supra*.

136. *Pianos & Parts Thereof*, *supra* note 55, discussed in text accompanying notes 54-61 *supra*.

137. *Piano Actions*, Tariff Commn. Publ. No. 331, at 3 (July 1970); *Piano Keyboards*, Tariff Commn. Publ. No. 352, at 4 (Jan. 1971).

138. *Silver-Plated & Stainless-Steel Table Holloware*, Tariff Commn. Publ. No. 348, at 6 (Dec. 1970) (3-to-1 vote) [hereinafter *Holloware*]; *Women's Leather Shoes*, Tariff Commn. Publ. No. 353, at 5 (Jan. 1971) (2-to-1 vote). The dissenters suggested that softness in the economy and changes in market demand were the major causes of unemployment. *Holloware supra* at 8-9; *Women's Leather Shoes supra* at 7-8.

139. In both *Holloware supra* note 138, at 5) and *Women's Leather Shoes supra* note 138, at 11), increases in imports followed the most recent concessions.

140. *Plastic or Rubber-Soled Footwear with Fabric Uppers*, Tariff Commn. Publ. No. 321 (April 1970) (3-to-2 vote) (workers and salaried employees); *Transformers*, Tariff Commn. Publ. No. 351 (Jan. 1971) (2-to-1 vote). Recent Kennedy Round reductions were mentioned, but were apparently deemed to be of no importance.

Moore, described the plant that had just closed as a "marginal enterprise" located in a building originally constructed in 1889.<sup>141</sup> Inexpensive products, which were in greatest demand, could not have been produced at this plant without new investment. "Large volumes" of such products had been produced domestically.<sup>142</sup> Under these circumstances, the finding that "but for" the imports there would have been no unemployment is open to serious question since superannuated enterprises are not likely to be able to compete in the domestic market. Hence the unemployment cannot have been due in major part to increased imports. The decision is inconsistent with several unanimous denials to be discussed later.<sup>143</sup>

A recent grant of a workers' petition involved imports of polyester cotton fabrics.<sup>144</sup> The duty on the bulk of these imports had not changed since 1958, while the increases in imports occurred during the latter half of the sixties. Commissioner Leonard's dissent denied the connection between trade concessions and increased imports, relying on the statement of the employer, who attributed his plight to low foreign wages.<sup>145</sup>

## 2. Relief Granted by Presidential Action

We discussed above the firm petitions ultimately decided by the President by breaking a tie vote in favor of relief.<sup>146</sup> The same difficulty occurred in certain workers' cases. These cases pose the procedural problem of whether tie votes can be avoided. Since Congress entrusted the decision to the Commission in the first place, we must assume that the Presidential authority to break tie votes was intended only as a last resort in case of deadlock.<sup>147</sup> A deadlock is inescapable when all six Commissioners<sup>148</sup> participate in a three-to-three vote or, as has repeatedly happened, the Commission's membership is reduced to four through vacancies and the votes are equally divided.<sup>149</sup> Apart

141. Plastic or Rubber-Soled Footwear, *supra* note 140, at 9.

142. *Id.* at 10.

143. See pt. V. C. 3. *infra*.

144. Broadwoven Polyester-Cotton Fabrics, Tariff Commn. Publ. No. 434 (Nov. 1971).

145. *Id.* at 7.

146. See text accompanying notes 114-19 *supra*.

147. By contrast, § 1(a) of the Antidumping Act, 19 U.S.C. § 160(a) (1970), provides that the Tariff Commission "shall be deemed to have made an affirmative determination if the Commissioners voting . . . are evenly divided . . ."

148. 19 U.S.C. § 1330(a) (1970), establishes a Commission of six members.

149. See, e.g., Automotive Soft Trim, Tariff Commn. Publ. No. 333 (Aug. 1970), *relief granted*, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1345 (1970); Protective Footwear of Rubber or Plastics, Tariff Commn. Publ. No. 330 (July 1970), *relief granted*, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1345 (1970); Electrical Components &



from these situations, tie votes should be avoided by requiring every sitting Commissioner to participate. But no such requirement has been imposed.<sup>150</sup>

In most of the workers' cases decided by the President in favor of the petitioners, Commissioners Clubb and Moore, the originators of the "but for" test, had voted for relief, and Commissioners Sutton and Leonard, opponents of that test, for rejection. Perhaps noteworthy is *Deflection Yokes and Horizontal Output Transformers*,<sup>151</sup> in which the statement that the major concessions had occurred more than two decades earlier<sup>152</sup> was answered by the counterstatement that trade agreement concessions since 1930 were "a decisive factor contributing to the increased imports,"<sup>153</sup> which in turn had caused the unemployment. The plant had been sold and the employer had moved its operations first to Portugal and then to Mexico.<sup>154</sup> With respect to the second causation requirement, the "but for" test presumably implied that the employer could meet import competition only by producing abroad. Foreign investment may thus adversely affect employment in this country<sup>155</sup> when domestic firms feel compelled to emigrate.<sup>156</sup>

---

Apparatus & Allied Products, Tariff Commn. Publ. No. 329 (July 1970), *relief granted*, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1345 (1970).

150. In four cases in which the President broke the tie, one or two Commissioners did not participate. Women's & Misses' Footwear, Tariff Commn. Publ. No. 361 (Feb. 1971) equally divided votes in TEA-W-37 through -41, -44, -47, -49, -54, *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 618 (1971); Women's, Children's & Infants' Footwear, Tariff Commn. Publ. No. 369 (March 1971) (equally divided votes in TEA-W-59-65), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 618 (1971); Deflection Yokes & Horizontal Output Transformers, Tariff Commn. Publ. No. 386 (1971), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 854 (1971); Pipe Organs, Tariff Commn. Publ. No. 397 (June 1971), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1097 (1971).

151. Deflection Yokes & Horizontal Output Transformers, Tariff Commn. Publ. No. 386 (April 1971), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 854 (1971).

152. *Id.* at 3-4.

153. *Id.* at 7. Similar arguments were made in Pipe Organs, Tariff Commn. Publ. No. 397, at 7-8 (June 1971), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1097 (1971).

154. Deflection Yokes & Horizontal Output Transformers, *supra* note 151, at 9.

155. It may also affect American exports if the firm moves abroad in order to produce inside foreign tariff walls to save costs in lieu of exporting from the United States. UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, REPORT TO THE PRESIDENT BY THE COMM. ON INTL. TRADE AND INVESTMENT POLICY 175 (1971) [hereinafter WILLIAMS REPORT], states that in 1968 United States imports from American owned foreign manufacturing plants amounted only to \$400 million. For a more pessimistic view of the adverse effect of these imports on United States employment, see the statement of Paul Jennings, President, International Union of Electrical, Radio and Machine Workers, in *Hearings Before Subcomm. on Foreign Economic Policy of Joint Economic Comm.*, 91st Cong., 2d Sess. 813-21 (1970).

156. In Automotive Soft Trim, Tariff Commn. Publ. No. 333 (Aug. 1970), *relief*

An even more complicated problem of foreign operations by an employer was presented in *Electronic Components and Apparatus*,<sup>157</sup> in which the employer of the displaced workers had moved the bulk of its production of television receiver components abroad. It sold some of these components in Asia and Europe but the major part of its foreign output was shipped to the United States for sale to domestic producers of television receivers. Many of these imported components were entered under Tariff Schedules Item 807.00, which exempts from United States duty the value of the United States components contained in the entered articles.<sup>158</sup> The disagreement between the Commissioners related not only to the application of the "but for" test to the first causation requirement but also to the evaluation of the foreign operations of the employer. Commissioners Clubb and Moore concluded that the attractiveness of the increased imports of components had forced the employer "to become an importer himself,"<sup>159</sup> while Commissioners Sutton and Leonard held that the unemployment resulted principally from a management decision to manufacture abroad.<sup>160</sup> That decision was apparently motivated in large measure by the desire to take advantage of the special tariff treatment accorded by United States law to articles assembled abroad with components produced in the United States. The real question, then, was whether the employer would have used this loophole in American tariff law, the repeal of which has been proposed,<sup>161</sup> even if there had been no increased import competition or whether this was a defensive strategy necessitated by such competition. A finding of causation between increased imports and unemployment would be justified only in the latter alternative.

Most of the remaining split decisions resolved in favor of the

---

*granted*, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1345 (1970), the disagreement within the Commission concerned whether the employer's decision to shift production to Ontario was due to the Canadian-American Automotive Agreement of Jan. 16, 1965, ([1966] 1 U.S.T. 1372, T.I.A.S. No. 6093, codified at 19 U.S.C. §§ 2001-33 (1970)), which permitted duty-free entry of automotive parts from Canada into the United States, or due to the sale by American Motors of its Kelvinator Division, within which the Soft Trim operations were located.

157. *Electronic Components & Apparatus*, Tariff Commn. Publ. No. 329 (July 1970), *relief granted*, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1345 (1970).

158. *Id.* at 4. Item 807.00, Revised Tariff schedule of the United States, 19 U.S.C. § 1202 (1970), provides preferential tariff treatment for:

Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

159. *Electronic Components & Apparatus*, *supra* note 157, at 10.

160. *Id.* at 4-5.

161. See H.R. 6550, 92d Cong., 1st Sess. (1971); H.R. 14188, 91st Cong., 1st Sess. (1969).

petitioners by Presidential action concerned workers employed in the footwear industry. There was the familiar disagreement about the effect of ancient trade agreement concessions on increased imports and about whether increased imports or other factors were the major cause in bringing about unemployment.<sup>162</sup>

Particularly striking are the conflicting opinions in a case concerning the workers of four shoe manufacturers, *Women's and Misses' Dress Shoes (Lemar Shoes)*,<sup>163</sup> in which Commissioners Sutton, Leonard, and Newsom held that most increased imports occurred prior to the first reductions in duty on January 1, 1968, when European "fashion leadership" had stimulated imports,<sup>164</sup> while Commissioners Thunberg, Clubb, and Moore found that the 140% increase in imports from 1965 through 1969 would not have reached their present level without the modest tariff concessions of the Kennedy Round, which were fatal to marginal operations.<sup>165</sup> The President broke the deadlock in this and in nine other footwear workers' cases in which Commissioners Clubb and Moore relied on their opinion in *Lemar Shoes* to support their votes for relief.<sup>166</sup>

### 3. *Denials of Petitions by the Commission*

The numerous denials of workers' petitions can be classified into several distinct categories. First, as previously observed in some of

162. Protective Footwear of Rubber or Plastics, Tariff Commn. Publ. No. 330 (July 1970) (equal division in plastic- or rubber-soled footwear), *relief granted*, 6 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1345 (1970); Women's, Children's & Infants' Footwear, Tariff Commn. Publ. No. 369 (March 1971) (equally divided votes in TEA-W-59 & -65), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 618 (1971); Women's & Misses' Footwear, Tariff Commn. Publ. No. 361 (Feb. 1971) (equally divided votes in TEA-W-37 through -41, -44, -47, -49, -54), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 618 (1971) (Commissioners Clubb and Moore, referring to their opinion in Women's & Misses' Dress Shoes, Tariff Commn. Publ. No. 323, at 13 (June 1970), indicated in connection with the first causation requirement that recent modest tariff concessions "can be sufficient to cause the demise of marginal operations"); Men's, Youths' & Boys' Footwear of Leather, Tariff Commn. Publ. No. 324 (June 1970); Television Receivers, Tariff Commn. Publ. No. 376 (April 1971); Television Receivers, Radios, & Phonographs, Tariff Commn. Publ. No. 380 (April 1971); Women's & Misses' Dress Shoes, Tariff Commn. Publ. No. 323 (June 1970), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 618 (1971); Women's, Youths', Boys' & Children's Footwear, Tariff Commn. Publ. No. 378 (March 1971).

163. Women's & Misses' Dress Shoes, Tariff Commn. Publ. No. 323 (June 1970), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 618 (1971) [hereinafter *Lemar Shoes*].

164. *Id.* at 6-7.

165. *Id.* at 13.

166. Women's & Misses' Footwear, Tariff Commn. Publ. No. 361, at 7 (June 1970), *relief granted*, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 618 (1971). In Women's Leather Shoes, *supra* note 138, in which Commissioners Clubb and Moore constituted the majority, *Lemar* was also cited as controlling. See also Women's, Youths', Boys' & Children's Footwear, Tariff Commn. Publ. No. 378 (March 1971) (2-to-2 vote, one Commissioner not voting, tie broken by President).

the firm petitions, there were some cases in which the advocates of "but for" found themselves in the minority. Typical of these cases was *Phonographs and Radio-Phonograph and Other Combinations*.<sup>167</sup> The majority, disregarding the Kennedy Round concessions as minor, denied causation between increased imports and tariff concessions made two decades earlier. Moreover, increases in imports had begun prior to the Kennedy Round reductions. The lone dissenter was Commissioner Moore, one of the authors of the "but for" test; he emphasized that the difference between United States and Japanese direct labor costs in the assembly of a typical radio chassis was less than 25% of the total trade agreement concessions since 1934 and that the plant felt compelled to import chassis.<sup>168</sup>

Second, a specific finding that the restoration of statutory duties would not be sufficient to make domestic products competitive with imported ones has led to unanimous denial.<sup>169</sup> Significantly, in one case the Commission, noting the enormous differences in hourly wages between the United States and the exporting countries, went out of its way to state that assembly workers in the major foreign supplying countries "are efficient in such assembly" and that, therefore, their low hourly earnings "are in great part translated into low unit labor costs."<sup>170</sup> This reasoning underscores the important lesson that the lower-wage country does not have a competitive advantage over the higher-wage country solely because of its lower wages; otherwise the positive American trade balance, which was lost only recently, would be inexplicable. The low-wage country will be ahead only if its productivity is equal or nearly equal to that of the high-wage country. General findings that unemployment was primarily due to an employer's inability to meet domestic competition will, of course, compel unanimous denial. This inability is usually evidenced by loss of business to United States rivals.<sup>171</sup>

---

167. *Phonographs & Radio-Phonograph & Other Combinations*, Tariff Commn. Publ. No. 409 (July 1971). Commissioners Sutton, Leonard, and Young constituted the majority, Commissioner Moore dissenting. The Chairman did not participate. Commissioner Clubb's term had expired.

168. *Id.* at 9-11. *Accord*, *Capacitors & Semiconductors*, Tariff Commn. Publ. No. 395 (May 1971) (3-to-1 vote, Commissioner Moore dissenting and Commissioner Clubb not participating); *Ceramic Floor & Wall Tile*, Tariff Commn. Publ. No. 318 (March 1970) (4-to-2 vote, Commissioners Clubb and Moore dissenting. Commissioner Thunberg, concurring, noted at 10 that a return to the statutory duty would more than double the current rates, but would not equal the amount of the price differential between domestic and imported tile).

169. *Toys, Dolls, Models & Games*, Tariff Commn. Publ. No. 372 (March 1971). *Stereo 8-Track Tape Cartridge Playing & Recording Systems*, Tariff Commn. Publ. No. 349 (Dec. 1970).

170. *Toys, Dolls, Models & Games*, *supra* note 169, at 5.

171. *Electrical Conduit & Fittings*, Tariff Commn. Publ. No. 424 (Oct. 1971) (total

Third, petitions have been denied on the grounds that the decline in the domestic economy, crippling strikes, and shutdowns due to superannuated equipment, managerial reorganization, shifts in consumer demands, and rationalization caused the unemployment.<sup>172</sup>

A number of other cases defy ready characterization. In one unusual case, a unanimous Commission denied a petition because there was "no correlation . . . between the decline in the rate of duty resulting from trade agreement concessions and the pattern of annual imports."<sup>173</sup> The statutory rate had been cut in half in 1948 without affecting imports, which increased only in 1966 and 1967. The first Kennedy Round reduction of 2% in 1968 resulted in an enormous increase in imports, but the second phase—a 1% reduction—in 1969 was followed by a drop in imports of more than 50%. In

---

domestic production increased, while sales of the employer decreased); Carbon Steel Wire Rod & Wire, Tariff Commn. Publ. No. 418 (Aug. 1971) (seventy-year old plant with fifty-year old equipment); Household Chinaware, Tariff Commn. Publ. No. 354 (Jan. 1971) (ninety-year old plant; company unable to cater to prestige market); Rayon Staple Fiber, Tariff Commn. Publ. No. 357 (Jan. 1971) (company's production displaced by new domestically produced fibers); Glass-Lined Steel Process Equipment, Tariff Commn. Publ. No. 370 (March 1971); Women's Dress Shoes, Tariff Commn. Publ. No. 402 (July 1971); Women's Leather Shoes, Tariff Commn. Publ. No. 399 (June 1971) (import competition weak with respect to employer's high-priced shoes); Men's Dress Shoes, Tariff Commn. Publ. No. 403 (July 1971) (one of two plants was seventy-one years old); Women's, Misses', Men's, Youths' & Boys' Footwear, Tariff Commn. Publ. No. 428 (Oct. 1971) (decline in popularity of company's products); Men's Dress Shoes, Tariff Commn. Publ. No. 417 (Aug. 1971) (employer's name, assets, and inventory purchased by Wisconsin firm, which planned to "style-up" products to meet domestic competition); Women's Vinyl Sandals & Slippers, Tariff Commn. Publ. No. 448 (Dec. 1971).

172. Women's Leather Sandals, Tariff Commn. Publ. No. 404 (July 1971) (prosperous firm closed plants for reasons "unrelated to the competitive effects of imported footwear"); Footwear Uppers, Tariff Commn. Publ. No. 429 (Oct. 1971) (reorganization and relocation of plants by parent company; no showing of increased imports); Bicycle Tires & Tubes, Tariff Commn. Publ. No. 325 (June 1970) (imports declined in 1969, cessation of production one of several steps "to eliminate marginal operations"); Electronic Receiving Tubes & Transistors, Tariff Commn. Publ. No. 396 (May 1971) (majority rejected "but for" test, and noted that duty free imports contained American components (*see* note 158 *supra* and accompanying text); Commissioner Moore, concurring, referred to "soft economic conditions in the U.S." and to a strike of more than three months duration); Fuel Injection Pumps & Nozzles, Tariff Commn. Publ. No. 390 (April 1971) (closing of plant due to cutbacks of defense expenditures); Cupramonium Continuous Filament Yarn, Tariff Commn. Publ. No. 384 (April 1971) (no increased imports, substitution of less expensive yarns due to "general adverse economic conditions"); Women's Dress Shoes, Tariff Commn. Publ. No. 415 (Aug. 1971) (New York plant closed because employer refused union's demand to restrict production to New York State); Unwrought Zinc, Tariff Commn. Publ. No. 430 (Nov. 1971) (superannuated equipment, loss to new plants, and domestic cost price squeeze); Women's Dress Shoes, Tariff Commn. Publ. No. 438 (Nov. 1971); Viscose Rayon Yarns Wholly of Continuous Fibers, Tariff Commn. Publ. No. 435 (Nov. 1971); Heels for Women's Footwear, Tariff Commn. Publ. No. 440 (Nov. 1971); Heels, Soles & Soling Sheets, Tariff Commn. Publ. No. 441 (Dec. 1971).

173. Can-Sealing Machines & Parts, Tariff Commn. Publ. No. 373, at 3 (March 1971).

1970, with another 2% cut in duty, imports more than tripled.<sup>174</sup> Presumably, the mysterious zig-zag course of imports, demonstrated by the spectacular fall in 1969 followed by an even more spectacular rise, explains this decision.

An even more unusual case was *Stainless Steel Wire*.<sup>175</sup> The only trade concession was a 2% reduction spread over four years, beginning on January 1, 1968, a peak year in the employer's business. In December 1968, the chairman of the Japan Iron and Steel Exporters' Association and the associations of steel producers of the European Coal and Steel Community addressed letters to the United States Secretary of State announcing that their exports to the United States in 1969 would not exceed a stated maximum and that in 1970 and 1971 such exports would be confined to limits representing at most a 5% increase over the preceding year. These commitments were made on the assumption that total shipments to the United States from all steel exporting nations would not exceed 14 million net tons during 1969 and would be limited to 5% increases in each of the following years, and that the United States would refrain from imposing increased import duties or quotas. It was also assumed that these proposals did not violate United States laws.<sup>176</sup> These unprecedented undertakings, which have since been followed by comparable understandings relating to textiles,<sup>177</sup> were intended to and

---

174. *Id.* at 4.

175. *Stainless Steel Wire*, Tariff Commn. Publ. No. 383 (April 1971).

176. 60 DEPT. OF STATE BULL. 93, 94 (1969). These communications were forwarded to the Chairmen of the House Ways and Means and Senate Finance Committees. One may wonder how these private undertakings to limit imports to the United States can be reconciled with the policy of the antitrust laws. The fact that they were the result of negotiations encouraged by the Government presumably immunizes the participants from liability.

177. The Textiles Agreements with Japan, Korea, the Republic of China, and Hong Kong resulted from long negotiations. See 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1408 (1971) (Remarks of R.L. Ziegler, Press Secretary to the President). The "Memorandum of Understanding with Japan," typical of the others, states that

Japan will apply restraints to wool and man-made fiber textile exports to the U.S. for three years beginning Oct. 1, 1971. The base level shall be 950 million square yards equivalent for all wool and man-made fiber textiles products divided between wool and man-mades as in U.S. imports during the 12 months period ending March 31, 1971.

Annual growth rates are specified. The textile industry did not file a petition for escape clause relief, and only five firm petitions and eight workers' petitions were filed by its members. The contrast with the shoe industry (*see* text following note 190 *infra*), is significant. As to shoes, there were informal discussions with the Italian Government which resulted in a unilateral order (Protocol No. A/611163, June 26, 1971, Ministry of Foreign Trade Circular) requiring the chambers of commerce throughout Italy to make exports of footwear to the United States subject to the presentation of a foreign exchange certificate and invoices, accompanied by a visa of the chambers of commerce to the customs authorities. The chambers were to report monthly on all visas issued. The document refers to the possibility of import restrictions on shoes by the United

did forestall Congressional pressure for quotas.<sup>178</sup> "Voluntary" commitments by the major exporting countries were deemed preferable to legislated quotas, which would have been in violation of the GATT agreement.<sup>179</sup> The rigidity and semi-permanency of quotas was discarded in favor of a more flexible arrangement that the parties could claim was consensual in spite of the fact that it had been obtained by legislative threats. In short, it was expected that these "voluntary" restraints would provide sufficient protection for American industries that clamored for relief.

Ironically, for the Carpenter Technology Corporation, the employer of petitioners, the agreement to limit steel imports had a disastrous effect on its North Brunswick plant. The foreign importers changed their product mix by shipping to the United States a larger proportion of their more expensive products such as stainless steel wire; it was this increase in imports that compelled the closing of the plant and caused the petitioners' unemployment. A unanimous Commission was thus forced to conclude that the major cause of the increase in imports and of the unemployment was the program of voluntary restraints rather than tariff concessions.<sup>180</sup> Significantly, Japanese automakers are reported to have engaged in a similar ploy to get around the surcharge on imports imposed by President Nixon on August 15, 1971, and revoked on December 20, 1971.<sup>181</sup> By emphasizing luxury and sporty cars, which appeal to customers who do not worry about price, they "limit their very visible unit sales volumes without a proportionate loss in dollar income."<sup>182</sup>

The experience of the Carpenter Technology Corporation demonstrates the ingenuity of foreign enterprises in circumventing "voluntary" restrictions of their exports when these restriction are stated

---

States Government, which would have "grave consequences" for Italy. I am indebted for this information to Theodore R. Gates, Esq., Assistant Special Representative for Trade Negotiations, Executive Office of the President.

178. Quotas on steel imports were proposed in S. 2537, 90th Cong., 1st Sess. (1967), and H.R. 3, 132, 180, 3289 & 3330-32, 91st Cong., 1st Sess. (1969). A bill imposing quotas on shoes and textiles was passed by the House of Representatives in November 1970 (H.R. 18970, 91st Cong., 2 Sess. (1970)), but was not voted on in the Senate. Similar bills in the 92d Cong., 1st Sess. (H.R. 20, 442 & 5070 (1971); S. 4 (1971)) and bills proposing quotas on all imports (S. 2592 & H.R. 10914 (1971)) have not been acted on. Chairman Mills of the House Ways and Means Committee has stated that quotas on textiles would not be needed if the United States and Japan could come to an agreement on limitations of Japanese exports. N.Y. Times, Dec. 31, 1970, at 29, col. 5.

179. See Fulda, Book Review, 69 MICH. L. REV. 783 (1971).

180. Stainless Steel Wire, *supra* note 175, at 5.

181. Proclamation No. 4074, 36 Fed. Reg. 15724 (1971); Proclamation No. 4098, 36 Fed. Reg. 24201 (1971). The surcharge was intended to be a bargaining device to bring about agreement on new parities for the major currencies.

182. Wall St. J., Nov. 11, 1971, at 1, col. 6.

in over-all terms of historical shipments. The President's Commission on International Trade and Investment Policy (Williams Commission) has recommended that "orderly marketing agreements" be negotiated within GATT "under internationally agreed standards" whenever "imports of particular products cause or threaten to cause severe domestic adjustment problems in more than one importing country."<sup>183</sup> This procedure would be preferable to the present United States practice, which relies entirely on political bargaining induced by pressures from domestic industries.<sup>184</sup>

## VI. CRITICAL COMMENTS ON THE CASE LAW: THE NEED FOR NEW RULES

The numerous decisions surveyed above, to which new ones are constantly being added, present a confusing and unsatisfactory picture that cries out for reform. With respect to procedure, we have already noted that equal division of the Commission could have been avoided in numerous cases by a rule requiring participation of all sitting Commissioners. This requirement would substantially reduce the opportunity for the President to break tie votes. On the substantive side reform will be more complicated and ultimately will require new legislation. The following is an attempt to identify the specific problems raised by the cases and the present statutes.

### A. *The Relationship Between Industry (Escape Clause) Relief and Individual Adjustments*

The Williams Commission Report suggests that the eligibility requirements for escape clause relief on the one hand and individual adjustment assistance for firms and workers on the other should not remain identical but that the former should be more severe than the latter.<sup>185</sup>

There are two fairly obvious reasons for this proposed difference in standards. In the first place, escape clause relief is granted to an industry in the form of an "increase in, or imposition of, any duty

183. WILLIAMS REPORT, *supra* note 155, at 64. The Williams Commission referred to the Long Term Cotton Textile Arrangement (Feb. 9, 1962, [1962] 3 U.S.T. 2672, T.I.A.S. No. 6940, extended to Sept. 30, 1973, [1970] 2 U.S.T. 1970, T.I.A.S. No. 6940) as an example. Article 4 of this agreement allows bilateral arrangements not inconsistent with the basic objectives of this agreement; under it, the United States has entered 20 such bilaterals.

184. See Metzger, *Injury and Market Disruptions from Imports*, in papers submitted for WILLIAMS REPORT (*supra* note 155) [hereinafter WILLIAMS PAPERS], pt. I, at 167. For the views of specific industries, see Stinson, *The Import Problem of the American Steel Industry*, in *id.*, pt. I, at 289; Lynn, *The Import Problem of the American Textile and Apparel Industry*, in *id.*, pt. I, at 303.

185. WILLIAMS REPORT, *supra* note 155, at 49-51.



or other import restriction on the article causing or threatening to cause serious injury to such industry."<sup>186</sup> This action would entitle other countries affected by such action to withdraw "substantially equivalent concessions,"<sup>187</sup> thereby harming United States exports. In contrast, individual adjustment assistance to firms or workers has no international repercussions since it affords relief only to the petitioners. Hence it is logical that escape clause relief should be more difficult to obtain than individual relief. This conclusion follows from the commitment of the United States, in its own best interest, to liberal world trade, which, in spite of steel and textile agreements and so far unsuccessful proposals for quota legislation, is still the guiding principle of our foreign economic policy.<sup>188</sup> The raising of trade barriers should, therefore, not be encouraged but used only as a last resort in emergency situations of wide impact.

The second reason is closely related to the first. Escape clause relief is intended to be available only when an entire industry is suffering serious injury. Since it rarely, if ever, happens that every firm in the industry is adversely affected by imports, there are bound to be some enterprises that would get a windfall of undeserved protection if tariffs were raised or quotas imposed. Other firms may have suffered some losses without impairment of their capacity to survive. Individual adjustment assistance, on the other hand, is exclusively tailored to the need of firms that are in difficulty and of workers who have lost their jobs. Helping them involves some cost to the taxpayer, which can be justified on the ground that these firms and workers are the victims of the national policy of liberalized trade. The benefits of that policy to consumers and to the national economy, which is challenged by imports to maintain its competitive drive and which would be damaged by foreign retaliation to our import restrictions, presumably far outweigh the relatively small expense of public funds for adjustment assistance.<sup>189</sup> Moreover, the realignment of currencies achieved by the Agreement of the Group of Ten on December 18, 1971, is expected to create more favorable conditions

---

186. 19 U.S.C. § 1981(a)(1) (1970).

187. GATT, art. XIX, para. 3.

188. "Let us see to it that as far as trade barriers are concerned that it is a two-way street, that markets abroad are open to the United States as we open markets in the United States to nations abroad." President Nixon, remarks at Associated Milk Producers Convocation in Chicago, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1242, 1243 (1971). "Looking to the future, you can be assured of our cooperation in reducing barriers of trade, rather than raising them . . . ." President Nixon, remarks at White House Reception for Officials of International Monetary Fund, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1359, 1360 (1971).

189. See WILLIAMS REPORT, *supra* note 155, at 48-49; Metzger, *Adjustment Assistance*, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 319, 322-23.

for the United States trade balance and thereby reduce the number of industries that could invoke the escape clause.<sup>190</sup>

Finally, the paucity of escape clause cases compared with the large number of adjustment petitions shows that the adjustment assistance to firms and workers may be granted in many cases in which there may be no basis for escape clause relief for the industry to which these firms and workers belong. A particularly dramatic example of this situation is the footwear industry, whose petition for escape clause relief was unsuccessful, but which accounted for 65% of all workers' petitions and 40% of all firm petitions decided in 1970 and 1971. Even more significant was the President's recent action in the *Marble and Travertine Products* escape clause case noted above,<sup>191</sup> in which he decided that individual adjustment assistance rather than tariff increases was the appropriate form of relief. This case demonstrates the wisdom of the present law in giving the President discretion in escape clause cases to provide either for tariff relief or for adjustment assistance or both.<sup>192</sup> The proposal in the pending bills that would make it mandatory for the President to provide for adjustment assistance whenever he decides to ignore a Tariff Commission recommendation for industry relief<sup>193</sup> is a regrettable curtailment of Presidential discretion.

Our conclusion that escape clause relief should be more sparingly granted, and require stricter eligibility rules than adjustment assistance, compels a discussion of these rules as they are reflected in the cases.

#### B. *The First Causation Requirement: Increased Imports Due in Major Part to Trade Agreement Concessions*

The cases show that the first causation requirement is the major stumbling block and that the controversy about the proper interpretation of the statute involves the advocates and opponents of the so-called "but for" test. Since November 1969 these advocates, consistently backed by the President's tie breaking vote, have prevailed in a number of cases. However, there are inconsistent holdings and the question cannot be regarded as definitely settled.

The nub of the problem is the significance of the time interval between the granting of concessions and the increases in imports.

---

190. BNA, International Trade Reporter's Survey and Analysis of Current Developments, Dec. 24, 1971.

191. See text accompanying notes 90-96 *supra*.

192. 19 U.S.C. § 1902(a) (1970).

193. S. 4, § 112 & H.R. 20, § 112, 92d Cong., 1st Sess. (1971), *proposed amendments to* § 302(a)(2) of the Trade Expansion Act of 1962, 19 U.S.C. § 1902(a) (1970).

Everyone agrees, of course, that if that interval is short, causation "in major part" must be presumed. This agreement extends to cases in which small concessions granted by the Kennedy Round were followed by increased imports even though there had been large concessions years earlier. The difficulty arises when years or even decades have elapsed between the last concessions and the rise in imports or when recent concessions were so small that, in the absence of special circumstances, they cannot be assumed to have had any effect on imports. In such situations, "but for" means that causation "in major part" is present if the competitive advantage of the imports could have been prevented by maintenance of the 1930 Smoot-Hawley tariff. In other words, "but for" wipes out four decades of turbulent American history.

The hard facts of recent events do not support such a fanciful theory. All the cases deal with developments during the second half of the 1960's, which witnessed the "virtual doubling of U. S. Merchandise imports."<sup>194</sup> In some industries the surge was even greater. Specifically, "imports rose by nearly \$7 billion between 1967 and 1968, an increase of 23%."<sup>195</sup> This was a period of "severe overheating in the U.S. economy."<sup>196</sup> Indeed, the federal deficit in 1968 amounted to \$25.2 billion, which was three times as high as in 1967.<sup>197</sup> Outlays for national defense (mainly the Vietnam war) amounted to 45% of the federal budget in 1968, and to more than 40% in 1965 through 1967 and in 1969 and 1970.<sup>198</sup> These inflationary developments could not help but intensify upward pressures on domestic prices and wages<sup>199</sup> with detrimental effects on exports and encouragement for imports.

The repercussions of these pressures have been unfortunate. American wage rates have always been higher than those of other countries. Yet in this century they have been offset by the higher productivity of the American worker, as demonstrated by the consistent excess of our exports over imports. This positive trade balance reached an all-time high during the first half of the 1960's when it

---

194. WILLIAMS REPORT, *supra* note 155, at 45.

195. Kravis, *The Current Case for Import Limitations*, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 141, 143. During the same period exports increased by \$3 billion.

196. Houthakker, *The U.S. Balance of Payments—A Look Ahead*, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 31, 33.

197. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 373.

198. *Id.* at 373.

199. Bureau of Labor Statistics, *Comparative International Labor Cost and Productivity*, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 535, 536. See also Abegglen, *Dynamics of Japanese Competition*, in *id.*, pt. II, at 153, 156 ("U.S. inflation levels . . . have played havoc with U.S. competitiveness.").

averaged \$6.3 billion.<sup>200</sup> But from 1966 to 1970 this average dropped to \$3.7 billion<sup>201</sup> and in 1971 the balance showed a deficit for the first time.<sup>202</sup>

This development is confirmed by data showing the relationship between wage increases and productivity. The Bureau of Labor Statistics reports that during the first half of the decade "increases in hourly compensation in the U.S. were more than offset by larger increases in productivity, resulting in a decline in unit labor costs, while the generally larger productivity increases in Japan and Europe were not sufficient to offset the even more substantial increases in hourly compensation."<sup>203</sup> But in the second half of the decade, when inflation and the "guns and butter" program to finance the Vietnam War by deficit spending reached their peak, things began to turn sour: Based on a 1966 index of 100, United States unit labor costs reached 113 in 1969, compared to 102 in Japan and France, 101 in Germany, and 107 in Italy and the United Kingdom.<sup>204</sup> During that same period, according to the Bureau of Labor Statistics,

average hourly compensation in U.S. manufacturing rose at a 5.8 per cent rate; however, the productivity gain was only at a rate of 2.1 per cent. . . . Hence, the rise of unit labor costs. . . . Productivity in European countries grew at annual rates of 4 per cent or more from 1965 to 1969 and the rate of increase in Japan amounted to 15 per cent, in contrast to the U.S. 2.1 per cent rate.<sup>205</sup>

These over-all figures indicate that, with respect to industries subject to heavy import competition—those which are involved in the Tariff Commission cases—*United States competitiveness has been seriously*

200. STATISTICAL ABSTRACT, *supra* note 197, at 766.

201. *Id.*

202. The temporary surcharge on imports (*see* text accompanying note 181 *supra*) was imposed by the United States to safeguard its balance of payments and on the ground that a trade deficit of \$2 billion was forecast for 1971. *See* GATT Press Release of Aug. 26, 1971; Statement by the Deputy Undersecretary of State for Economic Affairs, N. Sammuels, at GATT Council Meeting, Aug. 24, 1971, released by U.S. Information Service.

203. Bureau of Labor Statistics, *supra* note 199, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 537.

204. Houthakker, *supra* note 196, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 36, 38.

205. Bureau of Labor Statistics, *supra* note 199, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 537. Taking 1967 as the base of 100, increases in the three succeeding years were as follows: Total output per man hour: 102.9, 103.7, and 104.6; compensation per man hour: 107.6, 115.4, and 123.6; total unit labor cost: 104.6, 111.3, and 118.2. STATISTICAL ABSTRACT, *supra* note 197, at 224. For data on specific import-competing industries whose productivity growth lagged, *see* Bureau of Labor Statistics, *Productivity and Unit Labor Costs in Export and Import-Competing Industries, 1958-1968*, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 507, 515-16. *See generally* Bureau of Labor Statistics, *The Meaning and Measurement of Productivity and Improving Productivity: Labor and Management Approaches*, BULL. No. 1715 (Sept. 1971).

weakened by causes other than trade agreement concessions.<sup>206</sup> The general assumption of the "but for" test, that tariff concessions since 1934 have been the major cause of increased imports, thus appears to be untenable. Indeed, the cases that applied the "but for" test by and large confirm the conclusion of Professor Kravis that tariff concessions did not play a major role in the increase in imports. Neither the reductions made in 1956 nor those in 1961 and 1962 had had a major impact on the increases in imports in the latter part of the 1960's that coincided with the Kennedy Round and in many cases produced cuts in tariffs "that can hardly have amounted to an average reduction in price to U.S. buyers of as much as 1 per cent."<sup>207</sup>

It follows then that the major cause for the doubling of imports during the latter part of the 1960's appears to have been American inflation with its unfortunate consequence of crucial losses in the high efficiency that prevailed until the middle of the decade.<sup>208</sup> It is to be hoped that the end of the war, the program to limit the domestic inflation, and a realignment of the major exchange rates will rekindle the competitive spirit.<sup>209</sup> The conclusion is inescapable that the "but for" test as applied to determine the connection of increased imports and trade concessions is a misinterpretation of the 1962 statute.

This leads us to the question of how that statute should be changed. The Williams Commission has recommended that applicants for both escape clause relief and adjustment assistance should not be required to show a connection between increased imports and a previous reduction of duties resulting from a trade agreement concession.<sup>210</sup> The three bills introduced in the House of Representatives

---

206. The Bureau of Labor Statistics concedes, of course, that there are United States industries with no significant import competition. See Bureau of Labor Statistics, *supra* note 199, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 539.

207. Kravis, *supra* note 195, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 149. Professor Kravis suggests that tariff changes have had relatively small effects on United States prices of imported goods and have brought about equal advantages for United States exporters. In some cases, because of the peculiar nature of the commodities involved, it has been found that very small tariff reductions would lead to greater imports. *Id.* at 163. See text accompanying note 106 *supra*.

208. It has been suggested that "a relatively better cost and price performance is only a partial help towards a better competitive performance . . . . Particularly in the consumer goods sector, U.S. firms may have to increase their flexibility and responsiveness to changes in demand, here and abroad . . . ." Solomon, *Trade, Investment and the Balance of Payments Adjustment Process*, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 71, 79.

209. President Nixon stated that his economic program was "designed to nurture and stimulate that competitive spirit; to help us snap out of the self-doubt, the self-disparagement that saps our energy and erodes our confidence in ourselves." Address to the Nation, Aug. 15, 1971, 7 WEEKLY COMP. OF PRESIDENTIAL DOCUMENTS 1172 (1971).

210. WILLIAMS REPORT, *supra* note 155, at 51.

early in the Ninety-second Congress would carry out this recommendation.<sup>211</sup> On the other hand, the Senate bill introduced in January 1971 by twelve Senators of both parties would retain the first causation requirement in modified form for escape clause actions while abolishing it for adjustment assistance.<sup>212</sup> The latter bill requires the Tariff Commission, in escape clause cases, to determine "whether an article upon which a concession has been granted under a trade agreement is, as a result, in whole or in part, of the duty or other customs treatment reflecting such concession, being imported . . . in such increased quantities . . . ." <sup>213</sup>

Thus the Senate bill points in the right direction by intending to make the standards for escape clause relief tougher than the eligibility requirements for individual adjustment assistance. But the language used for that purpose is questionable. The proposed standard—that an industry applying for import restrictions has to show only that the increased imports were "in part" due to trade agreement concessions—would go even further than the "but for" test by permitting industry relief on the basis of a finding that trade concessions, however insignificant or ancient, contributed ever so slightly to the increase in imports. This standard would make the first causation requirement meaningless and thereby practically restore the equality of treatment of escape clause and individual adjustments. Indeed, the desirability of maintaining the present language of the first causation requirement is illustrated by the Commission's recent five-to-one decision in *Television Receivers and Certain Parts Thereof*,<sup>214</sup> in which escape clause relief was denied because the increase in imports was attributed, "in major part," to dumping rather than concessions. If the dissent had prevailed, the industry might have obtained both antidumping duties and a tariff increase. Perhaps the inconsistencies in the cases could be eliminated by addition of the following proviso: "Increased imports shall be presumed, subject to rebuttal evidence presented by petitioners, to have been caused by factors other than trade agreement concessions if three years or more

---

211. H.R. 20, 442 & 5070, 92d Cong., 1st Sess. (1971). The three bills also contain the mandatory relief provisions for escape clause cases which were contained in the 1970 bill and were convincingly criticized by Professor Metzger, *supra* note 6, at 375-76. As of December 1971, no action had been taken on these bills.

212. S. 4, 92d Cong., 1st Sess. (1971). No action has been taken to date. See Comment, *The Trade Act of 1971: A Fundamental Change in U.S. Foreign Trade Policy*, 80 YALE L.J. 1418 (1971).

213. S. 4, 92d Cong., 1st Sess. § 111 (1971). H.R. 10192 and H.R. 10252, 92d Cong., 1st Sess. (1971), introduced by Congressman Betts and nine other House Members, use the same language.

214. *Television Receivers & Certain Parts Thereof*, Tariff Commn. Publ. No. 436 (Nov. 1971).

have elapsed between the granting of the concessions and the increased imports."

As explained above, most reform proposals would eliminate the first causation requirement for adjustment assistance to firms and workers;<sup>215</sup> this change is clearly desirable. The individual adjustment mechanism to hardship caused by imports need not be restricted to concession-generated imports. Such a restriction would limit the effectiveness of individual adjustment assistance as a safety valve against protectionist pressures and as a measure of relief to individual hardship caused by the free-trade regime of the GATT.

C. *The Second Causation Requirement: Increased Imports Must Be the Major Factor in Causing, or Threatening to Cause, Serious Injury*

As to the second causation requirement, the Williams Commission recommended no change in the existing language for escape clause relief, but it suggested that adjustment assistance should be available whenever "an increase in imports contributes substantially to causing . . . serious injury."<sup>216</sup> The four bills introduced at the beginning of the Ninety-second Congress would not differentiate between escape clause relief and adjustment assistance. Using identical language, they would require that the increased imports "contribute substantially toward causing or threatening to cause serious injury to the domestic industry producing articles like or directly competitive with the imported article."<sup>217</sup> Two subsequent House bills, omitting any qualifying words, simply refer to increased imports that cause serious injury.<sup>218</sup>

These proposals are less convincing than those directed at the first causation requirement. The cases demonstrate that the second causation requirement does not present difficulties comparable to those inherent in the first. By and large, the Commission has done a creditable job in determining when increased imports have or have not been the major cause of serious injury or threat of such injury. For instance, as we have seen, in numerous denials the Commission convincingly explained that the injury or unemployment was due to inability to compete with domestic rivals, corporate reorganization,

---

215. H.R. 10192 (§ 301) and H.R. 10252 (§ 301), 92d Cong., 1st Sess. (1971), would keep the first causation requirement for adjustment assistance to firms and workers, with "in whole or in part" substituted for "in major part."

216. WILLIAMS REPORT, *supra* note 155, at 51.

217. S. 4 (§ 111), H.R. 20 (§ 111), H.R. 442 (§ 111), H.R. 5070 (§ 111), 92d Cong., 1st Sess. (1971).

218. H.R. 10192 (§ 301), H.R. 10252 (§ 301), 92d Cong., 1st Sess. (1971). These bills make no distinction between escape clause relief and adjustment assistance.

recession, inflation, and other causes. There is, of course, always room for disagreement when the relative importance of a variety of complex factors must be weighed. But this difficulty could not be eliminated by any new legislative formula.

Last, but not least, the merits of the second causation requirement, as expressed in the present statutory language, are considerably stronger than those of the first. The philosophy of adjustment assistance is to relieve individual suffering caused by imports. To extend this relief to industries, firms, and workers to whose injury or unemployment increased imports have made only a minor contribution would be to turn the adjustment machinery into government insurance for inefficiency or for misfortunes only remotely connected with imports. This result would be fatal to the urgent national goal of revitalizing the competitive drive without which even seemingly advantageous currency realignments would be to no avail. Hence the existing law relating to the second causation requirement should remain as it is.

#### D. *The Substantive Benefits of Adjustment Assistance*

The substantive statutory benefits for firms and workers declared eligible for adjustment assistance have been explained elsewhere and need not be repeated here.<sup>219</sup> Although some firms and workers have received substantial help, there has been much criticism of the existing law and its administration. One important reason for complaint is delay. For instance, in December 1971 the Tariff Commission unanimously held that the former workers of the Utica Cutlery Company were entitled to receive adjustment assistance.<sup>220</sup> The firm itself had been declared eligible for adjustment assistance four months earlier<sup>221</sup> but at the time the workers' petition was decided the firm's proposal to the Department of Commerce was still "under consideration."<sup>222</sup> Apparently this is not a unique case.<sup>223</sup> The Williams Commission noted that "aid to workers becomes

---

219. See Bureau of Domestic Commerce, *Adjustment Assistance for U.S. Firms*, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 367; Department of Labor, *Adjustment Assistance for Workers*, in *id.* at 383; Metzger, *supra* note 6, at 389-97.

220. Stainless-Steel Table Flatware, Tariff Commn. Publ. No. 442 (Dec. 1971).

221. Stainless-Steel Table Flatware, Tariff Commn. Publ. No. 414 (Aug. 1971).

222. Stainless-Steel Table Flatware, *supra* note 220, at 2.

223. See Pierson, *Promises, Promises. Firms Hurt by Imports, Assured of Help in 1962, Find It Tough To Get*, Wall St. J., Dec. 8, 1971, at 1, col. 6. The author refers to a New York executive as saying that every time he sends Commerce Department officials some figures to prove that his company has been injured, "they ask for more figures." *Id.* at 16, col. 4. This had been going on for half a year. As to difficulties encountered by firms, see WILLIAMS REPORT, *supra* note 155, at 56-57; Fooks, *Trade Adjustment Assistance*, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 343, 352-53.



available long after the date on which actual layoffs have occurred and on which the process of relocation and training should have begun."<sup>224</sup> Specifically, the time elapsed between certification and the start of benefits averaged sixteen months.<sup>225</sup> Hence workers frequently do not begin to receive assistance until many weeks after they have lost their jobs. Since workers' allowances are limited in time, a large part will be paid retroactively; these payments will have to be used to liquidate debts incurred since unemployment began, thus making much of the adjustment allowance unavailable for subsistence during the retraining period.<sup>226</sup>

On the substantive side, the Williams Commission recommended wider benefits for workers, relaxation of the requirement concerning previous work and earnings, opportunities for technical and professional (in addition to vocational) training, family health benefits, and protection of pension rights.<sup>227</sup> For firms, the Commission urged more attractive terms of financial assistance at lower interest rates, tax benefits, and interim financing between approval and delivery of assistance. It indicated that such benefits should "normally be available only to small businesses."<sup>228</sup>

These recommendations deserve serious consideration by Congress, which in any event should set time limits ensuring speedy consideration and action. However, the additional recommendation to transfer eligibility determination from the Tariff Commission to the Executive Branch<sup>229</sup> should be rejected: It is essential that such determinations continue to be made by an independent agency that is less directly subject to political pressure than the Executive. Indeed, it cannot be repeated often enough that adjustment assistance to firms and workers should not degenerate into a general subsidy program. Adjustment assistance can serve the national interest only as a device to rehabilitate small businesses and workers—helpless victims of the nation's liberal trade policy—to the end that they may resume their places in the economy. And that inflation-ridden economy can be revitalized only by the competitive drive toward greater productive efficiency.

---

224. WILLIAMS REPORT, *supra* note 155, at 53.

225. Fooks, *supra* note 223, in WILLIAMS PAPERS, *supra* note 184, pt. I, at 350.

226. WILLIAMS REPORT, *supra* note 155, at 54.

227. *Id.* at 56.

228. *Id.* at 58. See also Metzger, *supra* note 6, at 397-400. The Department of Commerce has proposed to revise its regulations to provide for more accelerated procedures. See 37 Fed. Reg. 3726 (1972).

229. WILLIAMS REPORT, *supra* note 155, at 54.